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Supreme Court, U.S.
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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

MICHAELA BERESTEANU GOLIN,

Petitioner,

v.

BROOKHAVEN NATIONAL LABORATORY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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76 pp

QUESTIONS PRESENTED FOR REVIEW

1. The District Court denied the defendant's motion to dismiss for lack of a prima facie case at the close of plaintiff's case in chief, and permitted the defendant to offer evidence of its allegedly legitimate reasons for plaintiff's rejection. The question presented is whether the District Court erred in ruling that the plaintiff failed to establish a prima facie case of unlawful employment discrimination under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq. ("Title VII").

2. Whether the sexual harassment of a subordinate employee by her supervisor constitutes a violation of Title VII.

3. Whether the federal courts below erred in failing to consider plaintiff's retaliation claim under Title VII.

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner, Michaela Beresteanu Golin, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in these proceedings on April 19, 1985.

OPINION BELOW

The Court of Appeals affirmed without an opinion the decision of the United States District Court for the Eastern District of New York. The full text of the Court order is set out in the Appendix to this petition. (App. 1a-2a).

The decision of the District Court appears in an unreported Memorandum and Order dated January 26, 1984. (App. 3a-39a).

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on April 19, 1985. (App. 1a-2a). A timely petition for rehearing with a suggestion for rehearing en banc was denied on June 18, 1985. (App. 40a-41a). On September 9, 1985, Mr. Justice Marshall extended the time within which to file a petition for

a writ of certiorari to and including November 15, 1985. (App. 42a). This petition for a writ of certiorari was filed within 60 days of the date of Mr. Justice Marshall's order. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTES, RULES AND REGULATIONS INVOLVED

This action involves §§ 703(a)(1) and 704(a) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e-2(a)(1) and 2000e-3(a), respectively (App. 43a-44a); Rules 41(b) and 52(a) of the Federal Rules of Civil Procedure (App. 45a-48a); the Sexual Harassment section of the Equal Employment Opportunity Commission ("EEOC") Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11(a)-(g) (1984) (App. 49a-53a); and the Equal Opportunity Clause of the Executive Order

11246, as amended, 41 C.F.R. § 60-1.4 (1985) (App. 54a-55a).

STATEMENT OF THE CASE

A. Existence of jurisdiction below.

The jurisdiction of the District Court rests upon § 706(f)(3) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-5(f)(3).

B. Statement of undisputed facts.

The following facts are undisputed by the parties.

Petitioner, Michaela Beresteanu Golin, received a doctorate degree (PhD) in Theoretical Nuclear Physics from Rutgers University in 1975. After a one year postdoctoral appointment at Florida State University, Golin obtained a Research Associate appointment in the Physics Department at Brookhaven National

Laboratory. (Tp. 30-40).[1]

Respondent, Brookhaven National Laboratory ("Brookhaven" or "the Laboratory"), is a non-profit institution, supported by federal contracts, and engaged in multidisciplinary research in such areas as theoretical and experimental Physics, Chemistry, Biology, Accelerator, etc. (Td. 5-6, 11).

As a federal contractor employing approximately 700 scientists, (Td. 4), Brookhaven is subject to compliance with Executive Order 11246. See, e.g., 41 C.F.R. § 60 (1985). The Executive Order imposes on Government contractors the obligation not to discriminate against

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[1] References to testimony at trial will be made to the trial transcript. The transcript of April 4, November 30 and December 7, 1983, has been sequentially numbered from 1 to 156, and will be referred to as "Tp." The transcript of December 1, 1983 has been sequentially numbered from 1 to 142, and will be referred to as "Td."

employees and applicants for employment on the basis of race, color, religion, sex, or national origin, and to implement affirmative action steps to recruit, hire and promote minorities and women. 41 C.F.R. § 60-1.4 (App. 54a-55a).

During the period of time relevant to this litigation, both the Department of Energy federal contract compliance review and the Laboratory's Affirmative Action Plan documented the Physics Department's underutilization of professional women. (Def. Ex. E, offered and admitted in evidence at Tp. 101, rel. text reproduced at App. 68a; see also Def. Ex. G, Td. 35-36, App. 72a).

"'Underutilization' is defined as having fewer minorities or women in a particular job group than would reasonably be expected by their availability." 41 C.F.R. § 60-2.11(b) (1985). Despite advances, "much remain[ed] to be done" at

Brookhaven to "achieve equality of opportunity" for women scientists. (Def. Ex. G, Td. 35-36, App. 72a-73a).

At the Laboratory, Golin worked under the direct supervision of Dr. Sidney Kahana, the Group Leader of the Nuclear Theory Group. (Td. 25). Kahana reported directly to Dr. Nicholas Samios, the Chairman of the Physics Department. Samios in turn reported to Dr. George H. Vineyard, the Laboratory Director. Dr. Martin Blume, Deputy Chairman, assisted Samios in the administration of the Physics Department. (Td. 8, 36, 62).

As a Group Leader, Kahana had the responsibility to recommend all the employment decisions affecting his subordinates, e.g., their hiring, firing, evaluation, promotion, salary. (Td. 8-10, 23, 25, 44, 101, 115-116). Brookhaven does not publish any criteria for the evaluation of its low-level employees,

(Td. 54; Scientific Staff Manual, Def. Ex. A, Tp. 75), but relies entirely on the subjective recommendations of the individual's Group Leader. (Td. 8-10, 23, 25, 44, 101, 115-116).

As a Brookhaven Research Associate, Golin held a temporary one-year appointment, renewable up to a maximum of three years. "Research Associates are eligible, however, for term appointments in competition with candidates from other institutions." (Scientific Staff Manual, Def. Ex. A, p. 5, Tp. 75). Kahana had recommended, and obtained, such a promotion for one of Golin's colleagues, Dr. Anthony J. Baltz. (Td. 23).

Like the Research Associate positions, Brookhaven's lowest staff level or "term" appointments, are also temporary positions, renewable for a limited number of years. (Scientific Staff Manual, Def. Ex. A, p. 2, Tp. 75).

As of July 2, 1978, out of a total of 160 appointments to the permanent scientific staff, Brookhaven had only granted 2 permanent staff positions to women, i.e., approximately 1 percent. (Pl. Ex. 8, Tp. 68, App. 70a).

At trial, Samios was "somewhat surprised" that 10 to 15 percent of the Physics doctorates in the United States were held by women. (Td. 48). Blume did not know what percentage of doctorate degrees in Physics were awarded to women. (Td. 79, 81-82).

Beginning in January 1977, Golin was invited by Kahana to collaborate with him on a research project. (Td. 105). During this joint research work, Kahana subjected Golin to repeated and unwelcome sexual remarks, sexual advances, and requests for sexual favors. (Tp. 55-56). Kahana often sat next to Golin, and nudged her body with his elbow and with

his knee. (Kahana "do[es]n't remember any such advances." (Td. 107)). He repeatedly pointed to an abbreviation with obscene connotations, laughing and staring at Golin. Dr. Michel Bets testified at trial that he witnessed an incident where Kahana pinched Golin above her hip, and Golin rebuffed Kahana in public. (Tp. 6-7, 69). (Kahana does not deny Golin's public objections, does not remember touching her, and "do[es] not think [he] pinched her." (Td. 127-128)). Finally, one evening, in the summer of 1977, Kahana told Golin that he was going to see Usha Mallik, a female graduate student at Brookhaven, because Mallik was "more willing" than Golin. (Tp. 56-57). (Kahana "do[es]n't remember the name [Usha] Mallik ever came up." (Td. 124)). After the Mallik incident, Golin attempted to avoid Kahana as much as reasonably possible. (Td. 110, 140).

Kahana then told Golin that she should be flattered by his advances, (Pl. Ex. 10, Tp. 67, App. 60a), and should be "more realistic", as there were not enough jobs in her field. (Tp. 57). Kahana further discouraged Golin from attempting to remain at Brookhaven, and told her that she should seek employment with other groups that did similar work at Argonne National Laboratory, in Chicago, and elsewhere. (Tp. 58, Td. 118).

At trial, Dr. Evelyn H. Monsay, a former applicant for employment at Brookhaven, testified that during a seminar at the Laboratory, Kahana sat next to her, repeatedly nudged her with his foot and with his knee, leaned over her, and ostensibly moved his body towards her. Monsay had to withdraw repeatedly, to avoid Kahana, and she was upset and irritated by the time the seminar was over. (Tp. 126-127).

In December 1977, Kahana informed Golin that she would be discharged in October of the following year. (Tp. 60-61; Td. 118).

As soon as she was informed of Kahana's recommendation to terminate her, Golin contacted the Department Chairman's office, in an attempt to obtain redress. Because Samios, the Department Chairman, was not in his office, Golin reported to his secretary, Ms. Helen Streeter, everything that had been happening between her and Kahana. (Tp. 61). Streeter assured Golin that she would report everything to Samios, and that she would also convey to the Chairman Golin's request for an unbiased review of her professional qualifications. (Id.).

One or two days later, in December 1977, Golin returned to Samios' office. At a meeting where Blume was also present, Samios told Golin that "he knew ev-

erything [she] had been going through." (Tp. 61). Samios advised Golin to "go back to work and relax", as he and Blume "would investigate and do the best for [her] career." (Tp. 62).

However, on February 1, 1978, Samios and Blume told Golin that they had reviewed Kahana's recommendation, and saw no reason either to promote her or to renew her contract with the Physics Department. The review of Kahana's recommendation consisted in Samios and Blume asking the opinions of Dr. Joseph Weneser and Dr. Carl Dover, Kahana's long-time friends and close associates at Brookhaven. (Td. 29-32, 52-53). Blume, also a personal friend of Kahana's, (Td. 136), "looked at a few of [Golin's] papers" and concluded that "she was a reasonable scientist, but there was no reason to promote her to the scientific staff." (Td. 66). Samios "took a look at

several of [Golin's] publications, but not in great depth", (Td. 32), and his evaluation was "consonant with the opinions of Dr. Weneser, Dr. Dover and Dr. Kahana." (Id.). Weneser and Dover did not testify at trial.

Standard objective criteria for rewarding scientists in industry and academe are: productivity, measured by the number of professional publications, and originality, measured by the interest the individual's work has generated, i.e., by the science citation analysis. (Td. 47, 54; Tp. 62-63).

Dr. D. John Millener had been hired by the Nuclear Theory Group at the same time as Golin. Millener's initial, two-year, temporary staff appointment was due to expire at the same time time as Golin's temporary Research Associate appointment. Although Golin's objective professional qualifications were superior

to Millener's, (Tp. 62-63; Pl. Ex. 17, Tp. 135, 143-144, App. 74a-75a), Golin was terminated, while Millener was promoted to the highest temporary staff level, upon Kahana's recommendation. (Td. 43-44).

Following the February meeting with Samios and Blume, Golin attempted to obtain a transfer to a different group at Brookhaven. (Tp. 64, 103, 148; Td. 70). Since the Laboratory did not advertise professional vacancies, but followed a practice of "word-of-mouth" recruiting, (Td. 45; Tp. 70-71, 103), Golin relied on Blume's offer to find her a suitable new position at Brookhaven. (Td. 32-33, 70, 72). However, approximately half a year later, Blume had been unable to find any alternative employment for Golin. (Tp. 64).

Brookhaven was hiring hundreds of physicists during the period of time

relevant to this litigation, (Tp. 148), and had numerous openings for which Golin was qualified. (Td. 72-73). The defendant does not allege that the male physicists it hired were in any way more qualified than Golin.

At the end of June 1977, Golin first informed Samios and Blume that she intended to make a formal charge of sexual harassment against Brookhaven, and contact the Affirmative Action officer of the Department of Energy who was visiting the Laboratory. (Td. 73).

On July 1, 1978, Golin also wrote a letter to Dr. George H. Vineyard, the Laboratory Director, reporting to him Kahana's sexual harassment. (Pl. Ex. 10, Tp. 67, App. 58a-61a).

One month later, Vineyard replied to Golin's letter. (Def. Ex. D, Tp. 100, App. 63a-65a). He informed Golin that the Research Associate positions were intend-

ed to be temporary appointments, and that since Kahana's recommendation had been reviewed by other senior staff physicists, no remedial action would be considered by Brookhaven. He added that Golin's "serious charge" against Kahana would be investigated. (Id., App. 65a).

No investigation was performed, beyond Samios and Blume asking Kahana whether he had "sexually harassed" Golin. Upon Kahana's denial, no efforts were undertaken by Brookhaven to determine whether Golin's allegations were true. (Td. 36-38, 75).

Nor is it claimed that any corrective action was taken against Kahana from December 1977, when Samios told Golin that "he knew everything [she] had been going through", (Tp. 61), until December 1983, when the bench trial was concluded below.

Upon the termination of her

contract, Golin continued to work at Brookhaven without a salary for approximately one year. (Tp. 65). Then, without any assistance from Samios or Blume, Golin obtained industrial employment as a senior computer programmer/analyst. (Tp. 64).

C. Statement of disputed facts.

The above facts are undisputed by the parties, but several facts are in dispute.

Samios, who was Chairman of the Physics Department in 1977, alleges that Millener was promoted upon Kahana's recommendation that Millener showed "promise" and "was a bright individual." (Td. 44). Kahana claims that Millener was appointed to the highest temporary staff position because "there was some technical difficulty about his visa", (Td. 116), a "situation probably better

understood by the chairmanship." (Id.).

Samios claims that Baltz was promoted from Research Associate to staff upon Kahana's recommendation that Baltz showed "promise" and "originality". (Td. 23). However, Baltz was subsequently refused tenure at Brookhaven, (Td. 100), where this position constitutes "recognition of independent accomplishment of a high order in the performance of original research or of other intellectually creative activity appropriate to the purposes of the Laboratory." (Scientific Staff Manual, Def. Ex. A, p.4, Tp. 75). (Emphasis added).

Golin contends that Brookhaven prevented her from obtaining a transfer at the Laboratory in retaliation for her opposition to Kahana's sexual harassment. (Tp. 63-64, 147-148; Schedule E, Pretrial Stipulation of Contested Issues of Fact and of Law, App. 56a-57a). Blume claims

that Golin was uninterested in the employment opportunities he discussed with her. (Td. 72-73).

D. Summary of the holdings below.

Petitioner filed suit under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq., ("Title VII"), claiming that Brookhaven discriminated against her on the basis of her sex, and retaliated against her for opposing her supervisor's sexual harassment. (Schedule E, Pretrial Stipulation of Contested Issues of Fact and of Law, App. 56a-57a).

After a 4-day non-jury trial, during which the District Court heard testimony from petitioner, Bets, Monsay, Samios, Blume and Kahana, the Court dismissed the complaint "on the merits, for failure to establish a prima facie case of employment discrimination under Title VII of

the Civil Rights Act of 1964, as amended." (Memorandum and Order dated January 26, 1984, Conclusions of Law #14, App. 38a).

The Court of Appeals for the Second Circuit summarily affirmed, without an opinion, the decision of the Trial Court. (App. 1a-2a).

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW IS IN DIRECT CONFLICT WITH PRIOR DECISIONS OF THIS COURT AS TO THE PROPER INTERPRETATION OF THE PHRASE "PRIMA FACIE CASE" IN THE TITLE VII CONTEXT

In Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 254 n.7 (1981), this Court unanimously reaffirmed and emphasized the proper interpretation of the phrase "prima facie case" in the Title VII context:

> "The phrase 'prima facie case' not only may denote the establishment of a legally mandatory, rebuttable presumption, but also may be used by courts to describe the plaintiff's burden of producing enough evidence to permit the trier of fact to infer the fact at issue. McDonnell Douglas should have made it apparent that in the Title VII context we use 'prima facie case' in the former sense." (Citation omitted).

At the close of plaintiff's case in

chief in the District Court below, the defendant moved for dismissal pursuant to Rule 41(b) of the Federal Rules of Civil Procedure, (App. 45a), on the ground that the plaintiff had failed to establish a prima facie case of employment discrimination under Title VII. (Tp. 115-120). The defendant's motion was denied by the District Court, and the trial resumed with the testimony of the defendant's witnesses. (Td. 1-142).

According to this Court's holding in United States Postal Service Board of Governors v. Aikens, 460 U.S. 711, 714-715 (1983), "when the defendant fails to persuade the district court to dismiss the action for lack of a prima facie case, and responds to the plaintiff's proof by offering evidence of the reason for the plaintiff's rejection, the factfinder must then decide whether the rejection was discriminatory within the

meaning of Title VII. At this stage, the McDonnell-Burdine presumption 'drops from the case', 450 U.S., at 255, n.10, and the 'factual inquiry proceeds to a new level of specificity.' Id., at 255." (Footnote omitted; emphasis added).

However, after having denied the defendant's motion to dismiss, and having permitted the defendant to offer evidence in support of its allegedly legitimate reason for plaintiff's rejection, the District Court below ruled that:

> "The Complaint herein must be dismissed on the merits for failure to establish a prima facie case of employment discrimination under Title VII of the Civil Rights Act of 1964, as amended." (Conclusions of Law #14, App. 38a).

This decision was summarily affirmed by the Court of Appeals for the Second Circuit. (App. 1a-2a).

The ruling of the two federal courts below as to plaintiff's failure to

establish a prima facie case in the Title VII context squarely conflicts with this Court's well-established views. See, e.g., United States Postal Board of Governors v. Aikens, 460 U.S. 711, 714-715 (1983); Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 252-256 (1981); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 800-805 (1973).

In this case, as in Aikens, "[t]he District Court *** erroneously focused on the question of prima facie case rather than directly on the question of discrimination. Thus we cannot be certain that its findings of fact in favor of the [employer] were not influenced by its mistaken view of the law." Aikens, 460 U.S., at 717 (emphasis added).

An examination of the record below plainly shows that the most relevant and critical of the District Court's findings

of fact are so totally unsupported by the evidence as to result in a denial of justice.

Moreover, the undisputed evidence in this record abundantly "show[s] that [the employer]'s stated reason for [plaintiff]'s rejection was in fact pretext." McDonnell Douglas, 411 U.S., at 804.

For all the foregoing reasons, petitioner prays that the Court grant this petition for a writ of certiorari and review the judgment below.

2. THE DECISION BELOW IS IN DIRECT CONFLICT WITH THE DECISIONS OF OTHER COURTS OF APPEALS AS TO A PLAINTIFF'S CAUSE OF ACTION UNDER TITLE VII FOR A SUPERVISOR'S SEXUAL HARASSMENT

A. The decision below raises the significant and recurring question whether sexual harassment in employment is unlawful under Title VII.

Sexual harassment "refers to the unwanted imposition of sexual requirements in the context of a relationship of unequal power." C. A. MacKinnon, Sexual Harassment of Working Women 1 (1979).

"[S]exual harassment continues to be especially widespread." EEOC's Discrimination Because of Sex Under Title VII of the Civil Rights Act of 1964, as Amended; Adoption of Interim Interpretive Guidelines, 45 Fed. Reg. 25024 (1980).

"[E]ven extrapolating conservatively, given that nine out of ten American women work outside the home some time in their lives and that in April 1974, 45 percent of American women sixteen and over, or 35 million women, were employed in the labor force, it is clear that a lot of women are potentially affected. As the problem begins to appear structural rather than individual, Redbook's

conclusion that 'the problem is not epidemic; it is pandemic - an everyday, everywhere occurrence' does not seem incredible." C. A. MacKinnon, Sexual Harassment of Working Women 27 (1979) (footnotes omitted).

The courts and the EEOC Guidelines on Discrimination Because of Sex, 29 C.F.R. §§ 1604.1-1604.11 (1984), ("Guidelines"), have defined sexual harassment as follows:

> "Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment." Id., at § 1604.11(a).

To date, seven courts of appeals, in agreement with the EEOC Guidelines, 29 C.F.R. § 1604.11(a)-(c), (App. 49a-51a), have ruled that the sexual harassment of an employee by her supervisor is a violation of § 703 of Title VII. Horn v. Duke Homes, Div. of Windsor Mobile Homes, Inc., 755 F.2d 599 (CA7 1985); Vinson v. Taylor, 753 F.2d 141 (CADC 1985); Craig v. Y & Y Snacks, Inc., 721 F.2d 77 (CA3 1983); Katz v. Dole, 709 F.2d 251 (CA4 1983); Henson v. City of Dundee, 682 F.2d 897 (CA11 1982); Miller v. Bank of America, 600 F.2d 211 (CA9 1979); Simmons v. Lyons, 746 F.2d 265 (CA5 1984).

These decisions are based on the established Title VII principle that employers are vicariously liable for any racial, religious or national origin harassment of subordinate employees by supervisory personnel. See, e.g., Firefighters Institute for Racial

Equality v. City of St. Louis, 549 F.2d 506, 514-515 (CA8), cert. denied, 434 U.S. 819 (1977) (segregated employee eating clubs approved by supervisors, even though neither organized nor regulated by the employer, violate Title VII); Young v. Southwestern Savings and Loan Association, 509 F.2d 140, 144 n.7 (CA5 1975) (employer responsible under Title VII for supervisor's religious harassment of employee, even though supervisor lacked actual authority to fire, and employer had no opportunity to correct the problem); see also, e.g., Compston v. Borden, Inc., 424 F.Supp. 157, 160-161 (SD Ohio 1976) (demeaning religious slurs by supervisor violate Title VII); Gay v. Board of Trustees of San Jacinto College, 608 F.2d 127, 128 (CA5 1979) (defendant cannot escape responsibility for supervisor's racial discrimination even though supervisor had

no actual authority to fire employee); Anderson v. Methodist Evangelical Hospital, 464 F.2d 723, 725 (CA6 1972) (employer liable under Title VII for supervisor's racially discriminatory discharge of employee, despite employer's "outstanding record in regard to fair and impartial treatment of the races"); see also EEOC Guidelines, 29 C.F.R. § 1604.11, at 138, n.1 (1984).

In applying these well-established Title VII principles to sexual harassment, the courts and the EEOC rely on the Congressional judgment that "[d]iscrimination against women is no less serious than other forms of prohibited employment practices and is to be accorded the same degree of social concern given to any type of unlawful discrimination." House Report No. 92-238, U.S.Code Cong. & Adm. News, 2137, 2141 (1972).

Yet, the two federal courts below

have been reluctant to accept the proposition that the sexual harassment of an employee by her supervisor is unlawful under Title VII.

Even though this decision has not been reported, similar views are held by other federal and state courts. See, e.g., Fisher v. Flynn, 598 F.2d 663, 665 (CA1 1979) (university not liable for alleged conduct of a department chairman in conditioning a female professor's continued employment on her acquiescence to his sexual advances, because "[there was] no sufficient nexus between her refusal to accede to the romantic overtures and her termination"). See also, e.g., State University of New York at Albany v. State Human Rights Appeal Board, 37 FEP Cases 1806, 1808 (New York Supreme Court, Appellate Division, Third Department 1981) ("[t]he doctrine of respondeat superior, holding an employer

liable for the acts of his employees in the course of their employment, has not been accepted in cases involving sex discrimination (cf. Alexander v. Yale Univ., 2 Cir., 631 F.2d 178). There is an affirmative burden on the complainant to prove that the employer either had knowledge or acquiesced in the discriminatory conduct of a supervisor ***.").

Petitioner respectfully submits that the Congressional purpose should not be frustrated in this manner, and that additional, expensive and time-consuming litigation should be avoided. Therefore, it is vital that this significant and recurring employment discrimination question be definitively resolved by this Court.

B. The decision below is in direct conflict with the decisions of other courts of appeals as to an employer's liability for the offensive work environment

created by a supervisor's sexual harassment.

In the Memorandum and Order dated January 26, 1984, the District Court below did not undertake a determination on whether any sexual harassment had occurred. The Court rendered judgment for the defendant on the grounds that "[p]laintiff has failed to establish a prima facie case of sexual harassment predicated on the maintenance of a hostile work environment, because she has failed to establish that Dr. Kahana's superiors at Brookhaven in any way condoned or acquiesced in his alleged sexual harassment." (Conclusions of Law #9, App. 33a-34a).

The Court of Appeals for the Second Circuit affirmed this decision. (App. 1a-2a).

The ruling below is in direct conflict with the appellate decisions in

Vinson v. Taylor, 753 F.2d 141 (CADC 1985); Horn v. Duke Homes, Div. of Windsor Mobile Homes, Inc., 755 F.2d 599 (CA7 1985); Craig v. Y & Y Snacks, Inc., 721 F.2d 77 (CA3 1983); and Miller v. Bank of America, 600 F.2d 211 (CA9 1979).

Moreover, the uncontroverted evidence in this record makes plain that Golin proved Brookhaven's maintenance of a hostile and offensive work environment even under the most stringent liability standard adopted by the Trial Court. See, e.g., Henson v. City of Dundee, 682 F.2d 897 (CA11 1982).

In Henson, the Eleventh Circuit had made a distinction between "harassment that creates an offensive environment ('condition of work') and harassment in which a supervisor demands sexual consideration in exchange for job benefits ('quid pro quo')." 682 F.2d, at 908, n.18. The Eleventh Circuit held that even

though "[i]n the classic quid pro quo case an employer is strictly liable for the conduct of its supervisors, *** in the work environment case the plaintiff must prove that higher management knew or should have known of the sexual harassment before the employer may be held liable." Henson, 682 F.2d, at 910.

In support of these views, the Eleventh Circuit cited Bundy v. Jackson, 641 F.2d 934, 943 (CADC 1981) and Vinson v. Taylor, 23 FEP Cases 37, 42 (DC 1980). However, the latter has been overruled. In Vinson v. Taylor, 753 F.2d 141 (CADC 1985), quite contrary to the Eleventh Circuit's interpretation of Bundy and Vinson, the Court of Appeals for the District of Columbia made plain that the employer is vicariously liable for any sexual harassment perpetrated by a supervisor on a subordinate employee. Vinson, 753 F.2d, at 148-152.

The Vinson Court relies in part on § 1604.11(c) of the EEOC Guidelines, 29 C.F.R. §§ 1604.1-1604.11 (1984) which are unambiguous on the subject. Since the EEOC Guidelines do not conflict with earlier pronouncements of the agency, nor with other administrative interpretations of the statute, nor with legislative history, General Electric Co. v. Gilbert, 429 U.S. 125, 145 (1976), they are "entitled to great deference." Oscar Mayer & Co. v. Evans, 441 U.S. 750, 761 (1979). The District of Columbia Circuit, therefore, properly "attach[ed] considerable weight to this interpretation [of Title VII] ***." Vinson, 753 F.2d, at 149; see also id., at 148 n.60.

Vinson further emphasized that vicarious employer responsibility is not limited to unlawful discrimination by supervisors vested with full authority to hire, to promote or to fire, and that

"employers must answer for sexual harassment of any subordinate by any supervising superior." Vinson, 753 F.2d, at 150 (footnote omitted).

The Trial Court below based its Conclusion of Law #9 on a number findings of fact and legal arguments. Each of the Court's legal arguments is in direct conflict with the holding of a federal court of appeals that has considered the matter. Additionally, the most critical and relevant findings of fact are so totally unsupported by the record as to result in a denial of justice.

The Trial Court states that "as established in the findings of fact, Dr. Golin did not complain to Dr. Kahana's superiors at Brookhaven until after she was informed of their decision to sustain the employment determinations initially made by the Nuclear Theory Group." (Conclusions of Law #9, App. 34a).

(Emphasis added).

This conclusion is in direct conflict with the views of the Court of Appeals for the District of Columbia in Vinson v. Taylor, 753 F.2d 141, 148-152 (CADC 1985).

According to Vinson, "an employer *** is responsible for its acts and those of its *** supervisory employees with respect to sexual harassment regardless of whether *** the employer knew or should have known of their occurrence." Vinson, 753 F.2d, at 149 (footnote omitted), quoting the EEOC Guidelines, 29 C.F.R. § 1604.11(c). Therefore, the timing of Golin's complaint to upper management, and even the fact that she made such a complaint, are immaterial to Brookhaven's liability for the discriminatory acts of Golin's supervisor.

Furthermore, contrary to the Trial Court's finding, it is undisputed here

that as soon as she was notified by Kahana of his recommendation to discharge her, Golin complained about the sexual harassment to Samios' secretary, and, one or two days later, in December 1977, Samios told Golin that "he knew everything [she] had been going through". (Tp. 60-61). Samios and Blume admittedly sustained Kahana's employment decision only in February 1978, about two months after Golin's complaint. (Td. 28-32, 69).

The District Court further holds that "[e]ven crediting Dr. Golin's versions of the facts, she made no complaint of sexual harassment to Dr. Samios and Dr. Blume until at least six months after the alleged sexual harassment had ceased." (Conclusions of Law #9, App. 34a). (Emphasis added).

The Court's conclusion that Golin is barred from relief for having postponed her complaint to the employer's upper

management is in direct conflict with the decision of the Court of Appeals for the Third Circuit in Craig v. Y & Y Snacks, Inc., 721 F.2d 77, 80 (CA3 1983).

According to Craig, "[the corporation] suggests that Tomkins [v. Public Service Electric & Gas Co., 568 F.2d 1044 (CA3 1977)] imposed a requirement that an employer have actual or constructive knowledge of the sexual harassment at the time the advance was made. Nothing in Tomkins imposes such an unreasonable burden on an employee." Craig, 721 F.2d, at 80 (citation omitted).

Finally, the record does not support the Court's findings of fact. Even though Golin did attempt to avoid Kahana as much as reasonably possible, (Tp. 91-93, 98; Td. 110, 140), Golin continued to work with Kahana until November 1977. (Tp. 91-93, 98). It is undisputed that approximately one month later, Golin complained

to Samios' secretary about the sexual harassment. (Tp. 60-61). Therefore, the Court's finding that "even crediting Golin's versions of the facts" the harassment "had ceased" six months earlier is not supported by the record below.

In the view of the Trial Court, "although a showing of pervasive harassment can in an appropriate case give rise to a finding of constructive knowledge, Henson v. City of Dundee, supra, 682 F.2d at 905, no such showing of pervasive harassment was made here. The findings of fact herein establish that, even crediting Dr. Golin's testimony, no other employee experienced such harassment or voiced any complaint." (Conclusions of Law #9, App. 34a-35a). (Emphasis added).

Although Dr. Evelyn H. Monsay's testimony that she was sexually harassed by Kahana at Brookhaven (Tp. 126-127) is not in dispute, the District Court

apparently disregards this fact on the ground that Monsay was an applicant for employment at Brookhaven, and not a Brookhaven employee.

Such a narrow interpretation of Title VII conflicts with the principles established by other circuits. See, e.g., Rogers v. EEOC, 454 F.2d 234 (CA5 1971), cert. denied, 406 U.S. 957 (1972).

Furthermore, as the Court of Appeals for the District of Columbia Circuit pertinently noted in Vinson v. Taylor, 753 F.2d 141, 151-152 (CADC 1985), "[a] requirement of knowledge by the employer of Title VII transgressions by supervisory personnel would effectively eliminate vicarious Title VII responsibility altogether. It would reserve Title VII liability for only those employers who fail to redress known violations - a direct, not a substitutional, theory of attribution. This would be a retreat from

the level of protection Title VII has consistently and designedly afforded, and take a backward step we refuse to endorse." (Footnote omitted; emphasis added).

The District Court below further finds against the plaintiff on the grounds that "[the Brookhaven officials'] efforts to investigate Dr. Golin's charges and, if necessary, to remedy her allegations were thwarted by Dr. Golin's own refusal to cooperate with Brookhaven's investigation." (Conclusions of Law #9, App. 35a). (Emphasis added).

The District Court's interpretation of Title VII as requiring the plaintiff to exhaust company remedies squarely conflicts with the views of the Court of Appeals for the Ninth Circuit in Miller v. Bank of America, 600 F.2d 211 (CA9 1979).

In Miller, a sexual harassment case,

the Ninth Circuit "decline[d] to read an exhaustion of company remedies requirement into Title VII." 600 F.2d, at 214. The Ninth Circuit based its decision on the Supreme Court holdings in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 798-799 (1973) and Alexander v. Gardner-Denver Co., 415 U.S. 36, 49-50 (1974), and it reasoned in accordance with the well-established principle that "when an employee accuses a union of discrimination in violation of Title VII, the employee need not exhaust union remedies as a pre equisite to suit." Miller, 600 F.2d, at 214 (citations omitted).

The Miller viewpoint is especially appropriate in the sexual harassment context, where "the imbalance of power between harassing supervisor and harassed employee can impede the effectiveness of internal remedies ***." Note, Sexual

Harassment Claims . . Abusive Work Environment Under Title VII, 97 Harvard Law Review 1449, 1462 (1984); see also id., at 1462, n.68.

Moreover, the District Court's findings of fact are not supported by any evidence whatever. Despite its reassuring comments to Golin, Brookhaven admittedly made no efforts to investigate whether Golin's allegations were true, beyond asking Kahana whether he had sexually harassed her. And, while Brookhaven does not claim that Golin refused to cooperate with its pretrial discovery in these proceedings, no corrective action against Kahana has been alleged. As noted in Heelan v. Johns-Manville Corp., 451 F.Supp. 1382, 1389 (D Colo. 1978), a single call to the alleged perpetrator for verification or denial is not an investigation. Furthermore, as the Michigan District Court accurately

observed, "[t]he failure to investigate gives tacit support to the discrimination because the absence of sanctions encourages abusive behavior." Munford v. James T. Barnes & Co., 441 F.Supp. 459, 466 (ED Mich. 1977).

C. The decision below is in direct conflict with the decisions of other courts of appeals as to an employer's liability for a supervisor's imposition of sexual consideration as a quid pro quo for employment benefits.

In its Conclusions of Law #8, (App. 32a), the District Court below holds that "[p]laintiff has failed to establish a prima facie case of sexual harassment resulting in a tangible detriment to her employment because she failed to establish that such harassment resulted in an adverse employment decision."

The reasoning of the Trial Court, summarily affirmed by the Second Circuit, is in direct conflict with the appellate

views in Horn v. Duke Homes, Div. of Windsor Mobile Homes, Inc., 755 F.2d 599 (CA7 1985); Henson v. City of Dundee, 682 F.2d 897 (CA11 1982); and Miller v. Bank of America, 600 F.2d 211 (CA9 1979).

In Horn, without concerning itself with the presence or absence of any tangible job detriment, the Seventh Circuit held "that Title VII prohibits an employer, acting through one of its supervisory employees, from imposing sexual consideration as a condition of employment." 755 F.2d, at 603 (footnote omitted). The Court focused on the fact that "[b]ecause of her sex, ***, [plaintiff] was disadvantaged by pressure to submit to an additional, humiliating condition of employment that served no legitimate purpose of the employer." Horn, 755 F.2d, at 604 (emphasis added). Therefore, in agreement with section 1604.11(a)(1) of the EEOC Guidelines,

(App. 49a), the Seventh Circuit concluded that this condition alone was a violation of Title VII. The Court, moreover, adopted the EEOC's strict liability rule codified at 29 C.F.R. § 1604.11(c), (App. 50a), pointing out that the EEOC's judgment was "both persuasive and supported by precedent." 755 F.2d, at 604, n.6.

In Henson v. City of Dundee, 682 F.2d 897 (CA11 1982), the Eleventh Circuit addressed simultaneously the two quid pro quo forms of sexual harassment defined by the EEOC, 29 C.F.R., at §§ 1604.11(a)(1) and 1604.11(a)(2), and similarly held that "[a]n employer may not require sexual consideration from an employee as a quid pro quo for job benefits." Henson, 682 F.2d, at 908 (citations omitted; footnote omitted). More explicitly, where "[t]he acceptance or rejection of the harassment by an

employee [is] an express or implied condition to the receipt of a job benefit or the cause of a tangible job detriment", 682 F.2d, at 909, the employer is vicariously liable for the conduct of any offending supervisor. Id.; see also 29 C.F.R. § 1604.11(c). The Eleventh Circuit reasoned that "the supervisor relies upon his apparent or actual authority to extort sexual consideration from an employee. Therein lies the quid pro quo. *** [Therefore,] his conduct can fairly be imputed to the source of his authority." Henson, 682 F.2d, at 910 (footnote omitted) (emphasis added); see also id., at 911 n.22.

At the trial below, the supervisor did not deny that he subjected Golin to sexual advances, sexual remarks, and requests for sexual favors. (Tp. 55-57; Pl. Ex. 10, Tp. 67, App. 60a; Td. 107 ("I don't remember any such advances.")). Nor that he discouraged Golin from attempting

to remain at Brookhaven, telling her to be "more realistic" as there were not enough jobs in her profession. (Tp. 57-58). Furthermore, it is undisputed that as a Group Leader, Kahana had the authority to recommend all the employment decisions affecting his subordinates. (Td. 8-10, 23, 25, 44, 101, 115-116).

Therefore, quite apart from any tangible job detriment issue, Golin was disadvantaged at Brookhaven by "pressure to submit to an additional, humiliating condition of employment that served no legitimate purpose of the employer", Horn, 755 F.2d, at 604, and for which the employer is strictly liable. Id.; see also Henson, 682 F.2d, at 910.

Moreover, the record abundantly shows that Golin also suffered a tangible detriment to her employment as a consequence of her rejection of Kahana's sexual advances.

Indeed, it is uncontroverted here that at the expiration of Millener's and Golin's original, temporary appointments, Millener was promoted while Golin was terminated, even though Golin possessed higher objective professional qualifications than Millener. (Tp. 62-63; Pl. Ex. 17, Tp. 135, 143-144, App. 74a-75a). Upon Golin's complaint to upper management, Kahana's employment recommendation was only reviewed by Kahana's admitted friends and long-time associates at Brookhaven. (Td. 29-32, 52-53, 136). Additionally, it is undisputed that Brookhaven's underutilization of women scientists was documented both by the Department of Energy federal contract compliance review and by the Laboratory's Affirmative Action Plan, (Def. Ex. E, Tp. 101, App. 68a; see also Def. Ex. G, Td. 35-36, App. 72a), and it is admitted that "much remain[ed] to be done" at

Brookhaven "to achieve equality of opportunity" for professional women. (Def. Ex. G, Td. 35-36, App. 72a-73a).

All the foregoing facts necessarily show that the allegation made by senior Brookhaven physicists that "Golin was a reasonable scientist but there was no reason to promote her to the scientific staff", (Td. 66), which is here "[the employer]'s stated reason for [the plaintiff]'s rejection was in fact pretext." McDonnell Douglas v. Green, 411 U.S. 792, 804 (1973).

The District Court found against the plaintiff on the grounds that "Dr. Golin had no reasonable expectation of the appointment extension or promotion she sought". (Conclusions of Law #8, App. 32a-33a). This conclusion is squarely contradicted by Samios' admission that "it [was] reasonable for [Research Associates at Brookhaven] to assume that

there [was] a chance or possibility that they [would] remain at the Laboratory". (Td. 55).

Additionally, the District Court held that "[p]romotions from Research Associate to the regular staff, especially in the Nuclear Theory Group, were exceedingly rare (less than one in ten candidates) ***", (Conclusions of Law #8, App. 33a), a finding based on no evidence whatever, since no data on the number of promotions in the Nuclear Theory Group were produced at trial, "and were given only to exceptionally qualified individuals, which Dr. Golin was not", (id.), a finding unsupported by the record.

The defendant does not even contend that Baltz, one of the Research Associates who was granted such a promotion in the Nuclear Theory group, was exceptionally qualified. Samios simply claims that "the case was made [by

Kahana] on Baltz' promise" and "originality". (Td. 23). However, Baltz was subsequently denied tenure at Brookhaven, (Td. 100), and therefore, he lacked any "independent accomplishment of a high order in the performance of original research or of other intellectually creative activity ***." (Scientific Staff Manual, Def. Ex. A, p. 4, Tp. 75). (Emphasis added).

The District Court further states that "since the decisions not to grant a third year extension or to promote Dr. Golin to the Physics Department's staff were independently reviewed and ratified by persons who had no involvement in, or at that time knowledge of, the alleged sexual harassment, there is no basis to find that Dr. Golin's response to the harassment, if it occurred, resulted in an adverse employment decision as to her." (Conclusions of Law #8, App. 33a).

(Empasis added).

The Trial Court's findings are so totally unsupported by the evidence as to result in a denial of justice.

Indeed, it is uncontroverted here that Kahana's employment decision was ratified by Samios and Blume in February 1978, after consultation with Weneser and Dover. (Td. 32, 66). However, contrary to the District Court's finding, Samios undisputedly told Golin in December 1977, before undertaking any review of Golin's work, that "he knew everything [she] had been going through" (Tp. 61); Blume was unable to remember what was said at that December meeting (Td. 82); and there is not a scintilla of evidence in the record permitting one to infer that either Weneser or Dover lacked knowledge of Golin's sexual harassment complaint when they allegedly reviewed Golin's work. Moreover, the defendant's testimony

establishes that Blume, Weneser and Dover were Kahana's personal friends and close, long-time associates at Brookhaven. (Td. 29-32, 52-53, 136).

A very different judicial response was prompted by similar circumstances in the racial discrimination context.

In Gay v. Board of Trustees of San Jacinto College, 608 F.2d 127, 128 (CA5 1979), "the supervisor of custodial employees, using racial epithets, told [plaintiff] that she was fired. Defendant [could not] escape responsibility for the act of the supervisor on the ground that under institutional procedures not proved to be known to the plaintiff, only the president could fire an employee of the college."

Similarly, in Tidwell v. American Oil Company, 332 F.Supp. 424, 435 (D Utah 1971), despite the fact that the offending supervisor had "called in

nearly every other person in any supervisory capacity for consultation about [plaintiff's termination]", the employer was held vicariously liable for the supervisor's racially discriminatory acts. Id., at 436.

Furthermore, the views of the Trial Court below are in direct conflict with the decision of the Ninth Circuit in Miller v. Bank of America, 600 F.2d 211 (CA9 1979). In Miller, the Ninth Circuit held that "respondeat superior does apply here, where the [sexual harassment] action complained of was that of a supervisor, authorized to hire, fire, discipline or promote, or at least to participate in or recommend such actions ***." 600 F.2d, at 213 (emphasis added); see also Henson v. City of Dundee, 682 F.2d 897, 910 (CA11 1982).

Finally, as the Ninth Circuit pertinently recognized in Miller, "Title

VII itself, 42 U.S.C. § 2000e(b), defines 'employer' to include 'any agent of such a person' (i.e., employer)." 600 F.2d, at 213 (emphasis added).

For all the foregoing reasons, a grant of certiorari should issue to review the judgment below.

3. THE DECISION BELOW IS IN DIRECT CONFLICT WITH THIS COURT'S LONG-SETTLED PRACTICE TO REQUIRE A TRIAL COURT TO MAKE FINDINGS

In both courts below, the petitioner alleged that the employer discriminated against her on the basis of her sex, and retaliated against her for opposing her supervisor's sexual harassment, in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq. ("Title VII").

The first paragraph of the District Court's Memorandum and Order dated

January 26, 1984 (App. 3a) makes plain that the Court only considered the plaintiff's sex discrimination claim.

The District Court did not address plaintiff's additional claim that in retaliation for her sexual harassment complaint, the employer prevented her transfer to any other group at the Laboratory. (Tp. 64, 67; Schedule E, Pretrial Stipulation of Contested Issues of Fact and of Law, App. 56a-57a).

The Court's findings are limited to the termination of plaintiff's employment in the Physics Department's Nuclear Theory Group. (Findings of Fact #14 and #27, App. 9a-10a; id., at 16a). Moreover, the finding that "[f]rom the Fall of 1977 through Dr. Golin's termination in December 1978, there was no vacancy in the Nuclear Theory staff to which Dr. Golin could have been promoted", (App. 16a), is not supported by the evidence.

Contrary to the Court's finding, the defendant does not claim that it denied Golin's promotion for lack of a vacancy in its Nuclear Theory staff. It is undisputed that at least two such vacancies existed at the time. (Td. 60, 89-90).

The Court of Appeals for the Second Circuit affirmed without an opinion the decision of the District Court, (App. 1a-2a), and its summary affirmance order supports petitioner's assertion that her retaliation claim has been overlooked below.

The failure of the two federal courts below to consider petitioner's retaliation claim represents a denial of justice.

Rule 52(a) of the Federal Rules of Civil Procedure (App. 47a) requires that the court in a bench trial "shall find the facts specially", and it is the

Supreme Court's long-settled practice to require detailed findings. See, e.g., Schneiderman v. United States, 320 U.S. 118, 130-131 (1943) ("we would be inclined to reverse and remand to the district court for the purpose of making adequate findings"); Kelley v. Everglades Drainage District, 319 U.S. 415, 422 (1943). See also, e.g., Anderson v. City of Albuquerque, 690 F.2d 796, 803 (CA10 1982); Denofre v. Transportation Insurance Rating Bureau, 532 F.2d 43, 45 (CA7 1976).

Section 704(a) of Title VII of the Civil Rights Act of 1964 (App. 44a) makes it unlawful for an employer to discriminate against an employee "because he has opposed any practice made an unlawful employment practice" under Title VII (the "opposition" clause).

It is undisputed here that the petitioner opposed her supervisor's

sexual harassment and complained about it to her Department Chairman's office in December 1977, and to the Laboratory Director in July 1978. (Tp. 55-57, 60-61; Pl. Ex. 10, Tp. 67, App. 58a-62a). Seven courts of appeals that have addressed the matter agree with the EEOC that sexual harassment by supervisory personnel is unlawful under Title VII. Supra, at 29.

Furthermore, "[t]o fall under the protection of the opposition clause in § 704(a), behavior need not rise to the level of formal charges of discrimination. The opposition clause has been held to encompass informal protests, such as voicing complaints to employers ***." Armstrong v. Index Journal Co., 647 F.2d 441, 448 (CA4 1981) (citations omitted).

It is, therefore, beyond serious dispute that the petitioner's complaint to her employer's upper management was conduct protected by § 704(a) of Title

VII.

Finally, it is well established by now that in order to prove a retaliation claim, it is not necessary for the plaintiff to prove first the validity of the underlying discrimination claim. See, e.g., Love v. RE/MAX of America, Inc., 738 F.2d 383, 385 (CA10 1984); EEOC v. Crown Zellerbach Corp., 720 F.2d 1008, 1013, n.2 (CA9 1983).

From all the undisputed evidence below, it necessarily follows that the respondent's allegedly legitimate reason for terminating Golin's employment, namely the claim that Golin lacked interest in the job opportunities discussed with her, is pretextual. (Td. 72-73). See, e.g., Franks v. Bowman Transportation Co., 495 F.2d 398, 419 (CA5 1974), rev'd on other grounds, 424 U.S. 747 (1976) (the alleged lack of interest in job vacancies on the part of

blacks "is singularly unpersuasive in view of [the employer]'s heavy reliance on word-of-mouth recruiting." 495 F.2d, at 419-420).

For all the foregoing reasons, the failure of the two federal courts below to consider petitioner's retaliation claim represents a denial of justice, and so clearly violates this Court's well-established practice to require findings as to justify the grant of certiorari to review the judgment below.

CONCLUSION

In the interest of justice, a writ of certiorari should issue to review the judgment of the Second Circuit.

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November 8, 1985

85-826

No. _____

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

MICHAELA BERESTEANU GOLIN,

Petitioner,

v.

BROOKHAVEN NATIONAL LABORATORY,

Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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UNITED STATES COURT OF APPEALS
For the Second Circuit

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 19th day of APRIL, One Thousand Nine Hundred and Eighty-five.

PRESENT:

HON. J. EDWARD LUMBARD,
HON. ELLSWORTH A. VAN GRAAFEILAND,
HON. RICHARD J. CARDAMONE,
Circuit Judges.

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MICHAELA BERESTEANU GOLIN,

Appellant,

v.

ORDER
84-7154

BROOKHAVEN NATIONAL LABORATORY,

Appellee.

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Michaela Beresteanu Golin appeals from a judgment of the United States District Court for the Eastern District

of New York (Platt, J.) dismissing, after a non-jury trial, her claims of sexual harassment and sex discrimination under 42 U.S.C. § 2000e *et seq*. ("Title VII").

We affirm substantially for the reasons set forth in the district court's Memorandum and Order dated January 26, 1984.

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

Hon. J. Edward Lumbard

Hon. Ellsworth A. Van Graafeiland

Hon. Richard J. Cardamone

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

MICHAELA BERESTEANU GOLIN,	:	81 Civ. 1209
Plaintiff,	:	MEMORANDUM AND ORDER
-against-	:	
BROOKHAVEN NATIONAL LABORATORY,	:	January 26, 1984
Defendant.	:	

Platt, D.J.:

Plaintiff, Michaela Beresteanu Golin, has brought this action against defendant, Brookhaven National Laboratories ("Brookhaven"), on the grounds that Brookhaven discriminated against her on the basis of her sex, in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq. (1976). This case was tried before the undersigned on April 4, November 30, December 1 and December 7 of 1983. The

following constitute this court's findings of fact and conclusions of law, pursuant to Federal Rule of Civil Procedure 52(a).

FINDINGS OF FACT

1. Plaintiff was employed by Brookhaven as a Research Associate in the Nuclear Theory Group of the Physics Department from October 1, 1976 to December 31, 1978 (Trial Transcript ["Tr."] p. 29[1])

2. Brookhaven is an institution engaged in advanced, multi-disciplinary scientific research in such areas as nuclear physics, electronics and chemistry and is located in Upton, Long Island, New York (Tr. p. A-5).

3. Dr. Golin was granted a Bachelor of Science (B.S.) degree in physics from the State University of Sao Paulo, Brazil in 1969, a Master of Science (M.S.)

degree in physics from the University of Pittsburgh in 1970, and a Doctor of Philosophy (Ph.D.) degree in physics from Rutgers University in 1975 (Tr. pp. 29-30).

4. During her graduate education, Dr. Golin specialized in the field of nuclear theory, which consists of three areas: low energy, intermediate energy and high energy (Tr. pp. 30-31).

5. Upon receiving her doctoral degree in physics, Dr. Golin was employed as a post-doctoral research associate in nuclear theory at Florida State University from September 1975 through September 1976 (Tr. p. 32).

6. The position of post-doctoral research associate is a junior, entry-level, training position, which is customarily held by an individual for one, two and occasionally three years at any one institution (Tr. p. 9). A post-

doctoral physicist customarily obtains two or more such research associate positions at several institutions before securing a regular staff position as a research scientist (Tr. p. 9).

7. In May 1976, Dr. Golin wrote to Brookhaven and expressed an interest in being considered for a post-doctoral research associate position (Tr. p. A-91). Dr. Sidney H. Kahana, the Group Leader for Nuclear Theory in the Physics Department of Brookhaven responded by asking her to complete application forms and submit letters of reference. (Def. Ex. C).

8. The normal interviewing season for research associate positions at Brookhaven is January - March (Tr. p. A-92). During the first three months of 1976, Brookhaven's Nuclear Theory Group identified approximately five leading candidates for the position of Research

Associate (Tr. p. A-90). No offers were made to any of these candidates because Brookhaven's funding from the Department of Energy ("DOE") for the coming year was uncertain (Tr. p. A-91). When Dr. Golin's application was received in May 1976, Brookhaven's normal interviewing season was over (Tr. p. A-92).

9. In July 1976, Brookhaven received final approval of funding for the Physics Department and at that point knew that funds would be available to support a Research Associate in Nuclear Theory for the year beginning October 1976 (Tr. p. A-91). By July 1976, the five outstanding applicants previously identified by Brookhaven had obtained positions elsewhere and were unavailable (Tr. p. A-91).

10. By letter dated August 31, 1976 (Def. Ex. B), Dr. Nicholas P. Samios, who was at that time Chairman of the Physics Department, offered Dr. Golin the

position of Research Associate in the Physics Department for a one-year term expiring October 4, 1977. Dr. Golin accepted the position in September 1976 (Tr. p. 40).

11. As part of its normal orientation process, Brookhaven distributes a Scientific Staff Manual (Def. Ex. A) to all new professional appointees (Tr. p. A-19).

12. The post-doctoral Research Associate position that Dr. Golin held is described in the Manual (at p. 5) as follows:

> "Appointments as Research Associates may be made to unaffiliated scientists and engineers who have recently received their docotral [sic] degrees. These appointments are made for terms of one or two years from their effective date. Research Associate appointments are normally limited to a total effective duration of two years; however, when warranted, an extension to three years can be made with the Director's approval. At the expiration of an appointment as Research Associate, the individual is expected to find employment at another institu-

tion. Research Associates are eligible, however, for term appointments in competition with candidates from other institutions."

13. All Research Associates in the Physics Department are appointed for an initial term of one year and, absent unusual circumstances, reappointed for a second year (Tr. pp. A-24-25). Dr. Kahana told Dr. Golin prior to her August 1976 interview that it was unlikely that her appointment would exceed two years (Tr. p. A-93).

14. Occasionally, the appointment for a Research Associate who is employed in experimental physics is renewed for a third year, because it is sometimes impossible in the experimental area to complete a highly complex experiment in two years (Tr. p. A-17). Such an extension requires approval by both the Chairman of the Physics Department and Brookhaven's Director (Tr. p. A-9). This

type of extension has never been given to Research Associates who, like Dr. Golin, work in the theoretical, as opposed to experimental, discipline (Tr. p. A-17).

15. Upon termination of their two-year appointments, Brookhaven's Research Associates normally obtain positions at other institutions (Tr. p. A-12). In the Physics Department, approximately 10% of all Research Associates have been promoted to permanent positions on Brookhaven's scientific staff. In the Nuclear Theory Group, only one individual has been promoted from Research Associate to a scientific staff position since 1970 or before (Tr. p. A-22).

16. As a Research Associate, Dr. Golin was permitted to pursue her own research projects or to collaborate with other members of the Nuclear Theory Group (Tr. p. A-100).

17. As Group Leader, Dr. Kahana was

Dr. Golin's immediate supervisor. While Dr. Kahana had no special authority over Dr. Golin's work or employment status, he was responsible for recommending any personnel change in his department (Tr. pp. A-88; A-101). Dr. Kahana was one of three senior scientists in the Nuclear Theory Group, the other two being Dr. Joseph Weneser and Dr. Carl Dover (Tr. p. A-89). Dr. Kahana did not assign work to Dr. Golin or control with whom she collaborated (Tr. p. A-101).

18. During the first few months of her employment, Dr. Golin worked primarily on her own research projects (Tr. pp. 42, 51, 81). During this period, Dr. Golin has only intermittent contacts with Dr. Kahana. For the most part, such contacts occurred when she sought out Dr. Kahana's advice. The comments he made on her work during this period were, according to Dr. Golin, constructive and helpful and she

was grateful for his guidance (Tr. p. 51).

19. In December 1976, Dr. Kahana and Dr. Dover each offered Dr. Golin an opportunity to work with them on their respective research projects. Dr. Golin chose to work with Dr. Kahana. Consequently, beginning in January 1977, Dr. Golin and Dr. Kahana met more frequently to review her work (Tr. p. 84).

20. Dr. Golin collaborated with Dr. Kahana from January through approximately April 1977 (Tr. pp. 53; A-108). Dr. Golin alleges that during this period of time she was subject to sexual harassment by Dr. Kahana (Tr. pp. 54-58). The events complained of were of three types: Nudges by Dr. Kahana's knee or elbow at staff meetings, in the cafeteria or while collaborating; remarks which Dr. Golin interpreted to be of a sexual or provocative nature; and an incident of touching

or pointing to Dr. Golin's waist line in connection with her comment about cafeteria food causing her to gain weight (Tr. pp. 55-58; A-109-113; A-123-28). In view of our conclusions of law, we do not find it necessary to decide whether or not any of the alleged incidents of harassment actually took place.

21. In April 1977, Dr. Golin withdrew from active collaboration with Dr. Kahana on his research project (Tr. p. A-108). Dr. Kahana was very critical of some of the work that Dr. Golin had performed for him (Tr. p. A-106-07). According to Dr. Golin, his criticism of her work was unfair (Tr. p. 51).

22. Dr. Golin did not complain about sexual harassment or any personal problems with Dr. Kahana to anyone with supervisory responsibilities at Brookhaven at any point during 1977 (Tr. p. 97). Specifically, Dr. Golin did not

complain to Dr. Samios, the Physics Department Chairman, or to Dr. Martin Blume, the Assistant Chairman of the Physics Department with primary responsibility for personnel matters. Dr. Golin never complained to Brookhaven's affirmative action personnel (Tr. p. 97) though the availability of such avenues of redress were well publicized in Brookhaven's Equal Employment Opportunity Policy Statement (Def. Ex. G) and other sources (Tr. pp. A-35-36).

23. In April 1977, Dr. Kahana recommended Dr. Golin for a one-year extension of her initial appointment (Tr. p. A-24). On May 3, 1977, Dr. Golin's appointment as a Research Associate in the Nuclear Theory Group was extended for a second year, to expire on October 4, 1978 (Tr. pp. A-25; 53).

24. In the Fall of 1977, Dr. Kahana spoke with Dr. Golin to remind her that

her position as Research Associate was a temporary, training position which would end at the conclusion of her second year and that she should, therefore, begin making inquiries at other institutions for employment beginning in October 1978. Dr. Kahana made it a practice to remind Research Associates in the Nuclear Theory Group of the termination date of their appointments to allow them adequate time to seek new employment at other scientific institutions (Tr. pp. A-117-18).

25. Subsequently, Dr. Golin discovered that Dr. D. J. Millener, who had been hired by Brookhaven as an Assistant Physicist, was being advanced to Associate Physicist (Tr. pp. 55; A-118). Dr. Millener's advancement was based entirely on his own ability and was unrelated to Dr. Golin's employment at Brookhaven.

26. Dr. Millener had been originally hired as a member of the scientific

staff, which, unlike Dr. Golin's position, was a "tenure-track" appointment (Tr. pp. A-12-16). His advancement to Associate Physicist was in accordance with the normal progression of Brookhaven's staff personnel (Tr. p. A-44).

27. Dr. Millener's advancement did not create a vacancy on the regular staff, since the number of staff positions available at any time depends on the total budget allocation. Dr. Millener's advancement did not increase the number of budgeted staff positions in the Physics Department. From the Fall of 1977 through Dr. Golin's termination in December 1978, there was no vacancy in the Nuclear Theory staff to which Dr. Golin could have been promoted (Tr. pp. A-47-48).

28. There was no causal connection between any personal difficulties Dr.

Golin may have had with Dr. Kahana and her opportunities for advancement at Brookhaven. Dr. Kahana did not have the authority to promote Dr. Golin to the scientific staff or to extend her appointment for a third year (Tr. pp. A-9-10).

29. In December 1977, Dr. Golin met, at her request, with Dr. Samios and Dr. Blume. At that meeting, Dr. Golin stated her disagreement with the decision not to extend her Research Associate appointment for a third year. Dr. Samios and Dr. Blume offered to review that decision. Dr. Golin told Dr. Samios and Dr. Blume at this December meeting that she thought that Dr. Kahana's evaluation of her work was unfair; she did not tell them that she had any problems is her personal relationship with Dr. Kahana and made no mention of harassment, sexual or otherwise (Tr. pp. A-27-29).

30. Immediately following the December meeting, Dr. Samios and Dr. Blume conducted an independent review of Dr. Golin's work. Dr. Golin's work was discussed individually with each of the three senior scientists of the Nuclear Theory Group--Dr. Weneser, Dr. Kahana, and Dr. Dover--who all agreed that Dr. Golin, though hardworking, showed no particular originality, depth of insight, or promise of future contribution to scientific research. None of these individuals recommended that Dr. Golin's postdoctoral appointment be extended or that she be promoted to the regular staff (Tr. pp. A-29-32).

31. Dr. Blume and Dr. Samios also reviewed some of Dr. Golin's publications. They both concluded that the assessment of the Nuclear Theory Group was consistent with the quality of Dr. Golin's published work (Tr. p. A-32).

32. With the full concurrence of Dr. Blume, Dr. Samios determined that there was no basis to Dr. Golin's claim that she had been evaluated unfairly or that she was entitled to a promotion to a regular staff position (Tr. pp. A-31; A-69).

33. In February 1978, Dr. Samios and Dr. Blume met with Dr. Golin to advise her that they had completed their review and had concluded that there was no merit to her claim that she should be promoted or given an additional one year appointment as a Research Associate. Dr. Samios and Dr. Blume offered to assist Dr. Golin in finding a position at another institution (Tr. p. A-32).

34. At the February 1978 meeting Dr. Golin alleged that she was being harassed by Dr. Kahana. She had never previously made this claim to either Dr. Samios or Dr. Blume. Dr. Blume asked her what she meant by harassment. Dr. Golin responded

that the harassment was Dr. Kahana's reminders that she should be seeking employment at other institutions. She did not claim at this time that the harassment was sexual in nature (Tr. pp. A-33-5;A-70).

35. Because of Dr. Golin's complaints in early 1978 that Dr. Kahana was unfairly critical of her work, it was decided that for the remainder of her appointment at Brookhaven she would work under the direction of Dr. Weneser, who had previously been a Group Leader in the Nuclear Theory Group (Tr. p. A-34).

36. Following the February meeting, efforts were made by Dr. Blume, Dr. Weneser and Dr. Dover to assist Dr. Golin in finding subsequent employment both at other institutions and in other departments at Brookhaven (Tr. pp. A-33; A-70-3).

37. In late June 1978 Dr. Golin, at

her request, met with Dr. Samios and Dr. Blume. Dr. Golin stated that she had learned that an affirmative action representative from the DOE would be coming to Brookhaven and that she wanted to speak to him about the sexual discrimination and sexual harassment she had allegedly experienced. This was the first time Dr. Golin alleged to Dr. Blume or Dr. Samios that she had been subject to sexual harassment by Dr. Kahana (Tr. pp. A-34; A-73-4).

38. Dr. Golin never made any claims of sexual harassment or sexual discrimination until more that six months after she had been notified by Dr. Kahana that her employment at Brookhaven would terminate in October 1978. Indeed, Dr. Golin stated at trial that prior to Dr. Kahana's telling her in late 1977 that her appointment would not be renewed, she was not sure whether Dr. Kahana's prior conduct

had any sexual connotations (Tr. p. 55).

39. Dr. Samios and Dr. Blume asked Dr. Golin to identify the nature of the sexual harassment, but Dr. Golin would not give any specifics (Tr. p. A-34). In addition, Dr. Samios and Dr. Blume advised Dr. Golin that she should communicate directly to Brookhaven's Director, Dr. George H. Vineyard, concerning her allegations of sexual harassment (Tr. p. A-74). Neither Dr. Blume nor Dr. Samios attempted to dissuade Dr. Golin from speaking to the DOE affirmative action representative. Dr. Golin does not so allege.

40. Immediately following the June 1978 meeting with Dr. Golin, Dr. Samios and Dr. Blume met with Dr. Kahana to discuss her charges of sexual harassment. Dr. Kahana denied emphatically that he had ever sexually harassed Dr. Golin, and he asked for details of her allegations.

Dr. Blume and Dr. Samios replied that Dr. Golin had refused to provide any specifics (Tr. pp. A-36-7; A-75).

41. By letter dated July 1, 1978, Dr. Golin wrote to Dr. Vineyard objecting to the decision to terminate here appointment (Pltf. Ex. 10). The July 1 letter is the first written statement to defendant by Dr. Golin alleging sexual harassment or sexual discrimination by Dr. Kahana.

42. In the July 1 letter, Dr. Golin alludes to Dr. Millener's promotion and speculates that the decision was "motivated by personal revenge." However, the decision as to Dr. Millener was unrelated to Dr. Golin's employment status at Brookhaven and was not a decision that Dr. Kahana could make on his own (Tr. pp. A-15-16).

43. Dr. Golin further alleges in her July 1 letter that other women at Brookhaven "have been molested" by Dr.

Kahana. No female other that Dr. Golin ever communicated to any Brookhaven supervisors or managers that Dr. Kahana had allegedly engaged in sexual harassment towards them (Tr. p. A-38).

44. Dr. Vineyard did not receive Dr. Golin's letter until late July, because he was out of town. When he returned to Brookhaven, Dr. Vineyard promptly responded to Dr. Golin's allegations of sexual discrimination by letter of August 1, 1978 (Def. Ex. D). In that letter, Dr. Vineyard advised Dr. Golin that he would appoint a Committee to investigate Dr. Golin's allegations of sexual harassment. That Committee was appointed on August 11, 1978 (Def. Ex. H).

45. The Committee made arrangements for a hearing to take place later in August. On August 23, 1978, Dr. Vineyard received a letter from Dr. Golin's attorney (Def. Ex. E) stating that Dr. Golin

would not participate in the scheduled hearing on the ground that the Committee's investigation was limited to her allegations of sexual harassment by Dr. Kahana and would not extend to Dr. Golin's claim that she should have been promoted. Because of Dr. Golin's refusal to cooperate with the Committee, Brookhaven's investigation of her sexual harassment allegations was discontinued (Tr. p. A-38).

46. In September 1978, Dr. Samios met with Dr. Golin to determine what progress she had made in seeking new employment, and Dr. Golin stated that she was not exploring other employment opportunities (Tr. p. A-39). By letter dated September 21, 1978 (Def. Ex. I), Dr. Samios gave Dr. Golin a three-month extension of her employment through December 31, 1978 so that she would have more time to look for a new job. In granting the extension, Dr.

Samios stated that the extension was final. No further extensions of Dr. Golin's appointment were made.

47. For approximately nine months following her termination, Dr. Golin continued to work with research scientists on Brookhaven's staff and to use Brookhaven facilities. Dr. Golin had no permission from Brookhaven to engage in this activity, nor did she make any effort to obtain the proper authorization, although she believed she was permitted to use the facilities (Tr. p. 65).

48. In November 1979, Dr. Golin began work as a programmer-analyst for the FMC Corporation in New Jersey. Her starting salary in that position was $25,800, which exceeded by more than $10,000 the highest salary she had earned as a Brookhaven Research Associate (Tr. p. 66).

CONCLUSIONS OF LAW

1. The plaintiff has complied with all preconditions necessary to bring this civil action, founded upon Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq*. (1976), against defendant.

2. This court has jurisdiction over the subject matter and of the parties to this action in accordance with 42 U.S.C. § 2000e-5(f)(3) (1976).

3. A plaintiff alleging employment discrimination in violation of Title VII by virtue of a denial of employment or promotion must carry the initial burden at trial of establishing a *prima facie* case of discrimination by presenting concrete facts showing that plaintiff (1) belongs to a protected class; (2) has applied for and was qualified for a job or promotion sought; (3) was rejected for the position despite his or her qualifi-

cations; and (4) that the position remained open or was filled by non-minority applicants. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). Where termination rather than a denial of an employment opportunity is alleged, the plaintiff's prima facie case requires a showing that the plaintiff (1) belongs to a protected class; (2) satisfied normal requirements of his or her work; and (3) was replaced by a non-minority individual or, if not replaced, that non-minority workers with comparable records were recruited when plaintiff was terminated. Richardson v. Sunmark Industries, 560 F. Supp. 733, 736 (E.D.N.Y. 1983).

4. Only after the plaintiff succeeds in establishing a prima facie case in the first instance is the employer required "to articulate some legitimate, non-discriminatory reasons" for its actions, McDonnell Douglas Corp. v. Green, supra,

411 U.S. at 802. Thereafter, the plaintiff must prove "by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination." Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 253, 101 S. Ct. 1089, 1093, 67 L.Ed. 2d 207, 209 (1981) (footnotes omitted.)[2] "The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with plaintiff." Id.

5. An employee alleging sex-based discrimination under Title VII by virtue of sexual harassment must establish either (1) that the employee suffered an adverse employment decision or loss of a tangible job benefit as a consequence of his or her response to sexual harassment or (2) that the sexual harassment was of

such nature and magnitude as to create a hostile, intimidating or offensive working environment that substantially impaired the employee's job performance or psychological well-being. Phillips v. Smalley Maintenance Services, Inc., 711 F.2d 1524 (11th Cir. 1983); Katz v. Dole, 709 F.2d 251 (4th Cir. 1983); Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982); Bundy v. Jackson, 641 F.2d 934 (D.C. Cir. 1981); Cummings v. Walsh Construction Co., 561 F.Supp. 872 (S.D. Ga. 1983); Ferguson v. E.I. DuPont de Nemours & Co., 560 F. Supp. 1172, 1196-1199 (D. Del. 1983).

6. To establish a prima facie case of sexual harassment based on the denial of a tangible job benefit or adverse employment decision, it must be established that (1) the employee belongs to a protected group; (2) that the employee was subject to unwelcome sexual harassment;

(3) that the harassment complained of was based upon sex; and (4) that the employee's reaction to the harassment resulted in an adverse employment decision or loss or denial of a tangible job benefit. Henson v. City of Dundee, supra, 682 F.2d at 909; Miller v. Bank of America, 600 F.2d 211, 213 (9th Cir. 1979). In the context of the denial of a promotion or renewal of appointment, the fourth element can be established by showing that the employee was eligible for the promotion or renewal and, within the context of the employer's actual practice, had a reasonable expectation of the promotion or renewal sought, Bundy v. Jackson, supra, 641 F.2d at 953.

7. To establish a prima facie case of sexual harassment based on a hostile work environment, it must be established (1) that the employee belongs to a protected group; (2) that the employee was subject

to unwelcome sexual harassment; (3) that the harassment complained of was based on sex; (4) that the harassment was of such nature and magnitude as to affect a "term, condition or privilege" of employment and (5) that the employer knew or should have known of the harassment in question and failed to take prompt remedial action. Katz v. Dole, supra, 709 F.2d at 255; Henson v. City of Dundee, supra, 682 F.2d 903-05; Bundy v. Jackson, supra, 641 F.2d at 943; Ferguson v. E.I. DuPont de Nemours & Co., supra, 560 F. Supp. at 1197-99.

8. Plaintiff has failed to establish a prima facie case of sexual harassment resulting in a tangible detriment to her employment because she failed to establish that such harassment resulted in an adverse employment decision. First, Dr. Golin had no reasonable expectation of the appointment extension or promotion

she sought. Extensions for a third year were rarely given by Brookhaven's Physics Department and never to Research Associates in the theoretical group where Dr. Golin was employed. Promotions from Research Associate to the regular staff, especially in the Nuclear Theory Group, were exceedingly rare (less than one in ten candidates) and were given only to exceptionally qualified individuals, which Dr. Golin was not. Second, since the decisions not to grant a third year extension or to promote Dr. Golin to the Physics Department's staff were independently reviewed and ratified by persons who had no involvement in, or at that time knowledge of, the alleged sexual harassment, there is no basis to find that Dr. Golin's response to the harassment, if it occurred, resulted in an adverse employment decision as to her.

9. Plaintiff has failed to establish

a prima facie case of sexual harassment predicated on the maintenance of a hostile work environment, because she has failed to establish that Dr. Kahana's superiors at Brookhaven in any way condoned or acquiesced in his alleged sexual harassment. First, as established in the findings of fact, Dr. Golin did not complain to Dr. Kahana's superiors at Brookhaven until after she was informed of their decision to sustain the employment determinations initially made by the Nuclear Theory Group. Even crediting Dr. Golin's versions of the facts, she made no complaint of sexual harassment to Dr. Samios and Dr. Blume until at least six months after the alleged sexual harassment had ceased. Second, although a showing of pervasive harassment can in an appropriate case give rise to a finding of constructive knowledge, Henson v. City of Dundee, supra, 682 F.2d at 905, no

such showing of pervasive harassment was made here. The findings of fact herein establish that, even crediting Dr. Golin's testimony, no other employee experienced such harassment or voiced any complaint. Third, it is undisputed that the Brookhaven officials did not condone sexual harassment and that they reacted promptly to Dr. Golin's complaints. Their efforts to investigate Dr. Golin's charges and, if necessary, to remedy her allegations were thwarted by Dr. Golin's own refusal to cooperate with Brookhaven's investigation. Since Brookhaven responded fairly and reasonably to Dr. Golin's complaints, it cannot "be held liable for the environment created by" Dr. Kahana's alleged sexual harassment. Ferguson v. E.I. DuPont de Nemours & Co., supra, 560 F. Supp. at 1199.

10. To the extent plaintiff alleges

sex discrimination not related to sexual harassment, she has also failed to establish a prima facie case. The evidence clearly shows that Dr. Golin was neither eligible nor qualified for a third-year extension of her post-doctoral Research Associate position. The position of Associate Physicist, to which Dr. Millener was advanced, was not a position for which Dr. Golin applied or was even eligible. Moreover, Dr. Millener's advancement did not create a vacancy on the regular staff of the Nuclear Theory Group to which Dr. Golin could have been appointed, assuming, arguendo, she was qualified.

11. Even if we assumed, arguendo, that plaintiff had made out a prima facie case of employment discrimination, which she has not, defendant has articulated legitimate, nondiscriminatory reasons for its decision not to extend Dr. Golin's

Research Associate appointment for a third year or to promote her to a position on the regular scientific staff, and plaintiff has not shown by a preponderance of the evidence that such reasons were a pretext for discrimination.

12. In light of our conclusion that there was no open positon [sic] at Brookhaven for which Dr. Golin was qualified, and that Dr. Kahana's superiors did not acquiesce in any alleged sexual harassment, we find that no conduct by any agent or employee of defendant was in violation, as to plaintiff, of any provision of Title VII of the Civil Rights Act of 1964, as amended.

13. To the extent that any of the foregoing findings of fact constitute conclusions of law, they are adopted as such. To the extent that any of the foregoing conclusions of law constitute findings of fact, they are adopted as such.

14. The Complaint herein must be dismissed on the merits for failure to establish a prima facie case of employment discrimination under Title VII of the Civil Rights Act of 1964, as amended.

15. Plaintiff's prayer for relief must be denied in all respects and judgment entered for defendant.

16. Settle judgment with costs and disbursements on notice.

SO ORDERED.

/s/ Thomas C. Platt
U . S . D . J .

F O O T N O T E S

1 References to testimony at trial will be made to the trial transcript. The transcript of April 4, November 30 and December 7, 1983, will be referred to as "Tr. p. __." The transcript of December 1, 1983, will be referred to as "Tr. p. A-__."

2 Although the Supreme Court has recently held that district courts should not be overly formal in their approach to employment discrimination suits, see U.S. Postal Service Board of Governors v. Aikens, U.S. ____, 103 S. Ct. 1478, ____ L.Ed. 2d ____ (1983), we believe that the framework of the McDonnell Douglas and Burdine cases, supra, is well suited to the disposition of this case.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 18th day of JUNE one thousand nine hundred and eighty-five.

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MICHAELA BERESTEANU GOLIN,

Plaintiff-Appellant,

v.

No. 84-7154

BROOKHAVEN NATIONAL LABORATORY,

Defendant-Appellee.

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A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

/s/
Elaine B. Goldsmith
Clerk

SUPREME COURT OF THE UNITED STATES

No. A-189

MICHAELA BERESTEANU GOLIN,

Applicant,

v.

BROOKHAVEN NATIONAL LABORATORY

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including November 15, 1985.

/s/ Thurgood Marshall

Associate Justice of the Supreme Court of the United States

Section 703 of Title VII of the Civil Rights Act of 1964 ("Title VII"), as amended, 42 U.S.C. § 2000e-2 (1981)
Unlawful employment practices

Employer practices

(a) It shall be an unlawful employment practice for an employer-

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

Section 704 of Title VII,
as amended, 42 U.S.C. § 2000e-3 (1981)
Other unlawful employment practices

Discrimination for making charges,
testifying, assisting, or participating
in enforcement proceedings

(a) It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

FEDERAL RULES OF CIVIL PROCEDURE (1985)
Rule 41. Dismissal of Actions

(b) Involuntary Dismissal: Effect Thereof. For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the

court shall make findings as provided in Rule 52(a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

FEDERAL RULES OF CIVIL PROCEDURE (1985)
Rule 52. Findings by the Court

(a) Effect. [Effective until August 1, 1985.] In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be consid-

ered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

EEOC's GUIDELINES ON DISCRIMINATION BECAUSE OF SEX
29 C.F.R. § 1604.1-§ 1604.11 (1984)

§ 1604.11 Sexual Harassment.

(a) Harassment on the basis of sex is a violation of Sec. 703 of Title VII.[1] Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

(b) In determining whether alleged conduct constitutes sexual harassment, the Commission will look at the record as a whole and at the totality of the circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred. The determination of the legality of a particular action will be made from the facts, on a case by case basis.

(c) Applying general Title VII principles, an employer, employment agency, joint apprenticeship committee or labor organization (hereinafter collectively referred to as "employer") is responsible for its acts and those of its agents and supervisory employees with respect to sexual harassment regardless of whether the specific acts complained of were authorized or even forbidden by the employer and regardless of whether the employer knew or should have known of

their occurrence. The Commission will examine the circumstances of the particular employment relationship and the job junctions [sic] performed by the individual in determining whether an individual acts in either a supervisory or agency capacity.

(d) With respect to conduct between fellow emloyees, an employer is responsible for acts of sexual harassment in the workplace where the employer (or its agents or supervisory employees) knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action.

(e) An employer may also be responsible for the acts of non-employees, with respect to sexual harassment of employees in the workplace, where the employer (or its agents or supervisory employees) knows or should have known of the conduct and fails to take immediate and

appropriate corrective action. In reviewing these cases the Commission will consider the extent of the employer's control and any other legal responsibility which the employer may have with respect to the conduct of such non-employees.

(f) Prevention is the best tool for the elimination of sexual harassment. An employer should take all steps necessary to prevent sexual harassment from occurring, such as affirmatively raising the subject, expressing strong disapproval, developing appropriate sanctions, informing employees of their right to raise and how to raise the issue of harassment under Title VII, and developing methods to sensitize all concerned.

(g) Other related practices: Where employment opportunities or benefits are granted because of an individual's

submission to the employer's sexual advances or requests for sexual favors, the employer may be held liable for unlawful sex discrimination against other persons who were qualified for but denied that employment opportunity or benefit.

---

[1] The principles involved here continue to apply to race, color, religion or national origin.

Executive Order 11246, as amended,
43 Fed.Reg. 49240, 49242 (1978);
41 CFR § 60 (1985)
§ 60-1.4 Equal opportunity clause.

(a) Government contracts. Except as otherwise provided, each contracting agency shall include the following equal opportunity clause contained in section 202 of the order in each of its Government contracts (and modifications thereof if not included in the original contract):

During the performance of this contract, the contractor agrees as follows:

(1) The contractor will not discriminate against any employee or applicant for employment because of race, color, religion, sex, or national origin. The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race,

color, religion, sex, or national origin. Such action shall include, but not be limited to the following: Employment, upgrading, demotion, or transfer, recruitement or recruitement advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided by the contracting officer setting forth the provisions of this non-discrimination clause.

(2) The contractor will, in all solicitations or advertisements for employees placed by or on behalf of the contractor, state that all qualified applicants will receive consideration for employment without regard to race, color, religion, sex, or national origin.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- - - - - - - - - - - -X

MICHAELA BERESTEANU GOLIN,

Plaintiff,

- against -

BROOKHAVEN NATIONAL LABORATORY,

Defendant.

81 Civ. 1209 (TCP)

STIPULATION OF CONTESTED ISSUES OF FACT AND OF LAW

- - - - - - - - - - - -X

IT IS HEREBY STIPULATED AND AGREED, by and between the attorneys for the parties herein, that the following is a listing of the contested issues of fact and of law in this action:

1. Whether plaintiff, by reason of her education, training and experience, possessed the requisite qualifications for a scientific staff appointment at defendant, Brookhaven National Laboratory.

2. Whether plaintiff was sexually harassed by her supervisor, Dr. Sidney

Kahana in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq. ("Title VII").

3. Whether defendant failed to retain plaintiff and denied her promotion to a scientific staff position because of her sex in violation of Title VII.

4. Whether defendant's failure to retain plaintiff and to promote plaintiff to a scientific staff position was in retaliation for plaintiff's rejection of Dr. Kahana's advances and plaintiff's complaints about his sexual harassment of her in violation of Title VII.

5. Whether the procedures by which defendant decides to retain or appoint individuals to its scientific staff violate Title VII.

/s/ Sheldon Engelhard
Attorney for Plaintiff

/s/ Andrea S. Christensen
Attorney for Defendant

BROOKHAVEN NATIONAL LABORATORY
ASSOCIATED UNIVERSITIES, INC.,
UPTON, L.I., N.Y. 11973
DEPARTMENT OF PHYSICS
TELEPHONE: (516) 345-3748

July 1, 1978

Dr. George H. Vineyard, Director
Brookhaven National Laboratory
Upton, N.Y. 11973

Dear Dr. Vineyard,

I am writing to you, encouraged by your Equal Employment Opportunity Policy Statement of August 16, 1976.

I joined the Nuclear Theory Group at Brookhaven National Laboratory as a Research Associate on October 6, 1976. Since that time, I have worked on several important problems in many areas of Nuclear Physics. This can be seen in the 189 form which I am enclosing. In addition, I have been invited to give talks at the University of Iowa, at the University of Maryland and at the Florida State University. My work has generated a lot

of interest, and I have received letters from eminent Nuclear Theorists congratulating me and inviting me to collaborate with them. Additional work, performed in collaboration with Dr. S. Kahana, has been reported by him at the Tokyo Conference, at the Rochester Symposium on Heavy Ions and to the ERDA Visiting Committee.

In spite of my achievements, my appointment at this Laboratory will be terminated in October, 1978. The stated reason is that Research Associates are never promoted at BNL, although ample evidence points to the contrary.

When Dr. Kahana informed me of this decision, he also informed me that he had just promoted Dr. D. J. Millener. As Dr. Millener published little or nothing during his two year appointment, such a decision can only be motivated by personal revenge.

Dr. Kahana had been harassing me

sexually for several months, insisting that other women at the Laboratory were more "willing" than I was, and that I should be flattered by his advances. When I stated these facts to various staff members, Dr. Kahana became insulting.

I want to bring to your attention that I am not the only woman to have been molested by Dr. Kahana at BNL. Besides, one of our staff members mentioned that Dr. Kahana's intentions toward me were clear before I was hired. As a matter of fact, the position was never advertised, and this fact alone is a serious infraction of the Law.

I have already reported the above to Dr. N. Samios and to Dr. M. Blume, and I am aware of the fact that Dr. Samios has seriously reprimanded Dr. Kahana on his behavior.

Dr. Kahana's attitude toward me has been unfair and offensive. His decision

indicates the extent of his discrimination and his lack of respect for your Equal Employment Opportunity Policy Statement.

I trust that you will not tolerate such abuses at Brookhaven National Laboratory, and that I will not be forced into taking Legal Action.

Sincerely,

Michaela B. Golin

cc: Dr. N. Samios

BROOKHAVEN NATIONAL LABORATORY
ASSOCIATED UNIVERSITIES, INC.,
UPTON, L.I., N.Y. 11973
DEPARTMENT OF PHYSICS
TELEPHONE: (516) 345-3748

July 1, 1978

DR. N. Samios, Chairman
Department of Physics
Brookhaven National Laboratory
Upton, N.Y. 11973

Dear Dr. Samios,

Enclosed please find the copy of my letter to Dr. G. H. Vineyard. It is now clear to [redacted] that I have no alternatives.

Sincerely,

Michaela B. Golin

BROOKHAVEN NATIONAL LABORATORY
ASSOCIATED UNIVERSITIES, INC.
Upton, New York 11973

Office of the Director (516) 345-3335

August 1, 1978

Dr. Michaela B. Golin
Department of Physics

Dear Dr. Golin:

Please excuse my delay in replying to your letter of July 1, 1978. It was caused by my being out of town on business until this week, plus the need for a careful review of the matter.

In your letter you raise two issues which I believe are separate, and which I will address in turn. First, I have examined the procedures used by the Physics Department in reaching the decision not to extend your appointment. Since 1965 there have been 32 postdoctoral research appointments in theoretical physics (solid state, nuclear, and high energy

physics). Of this group, only two persons were subsequently appointed to staff positions. All of the others left after one or, at most two years, and, as such, your case is in conformity with the norm. This is consistent with policy as stated in the Scientific Staff Manual, page 5: "At the expiration of an appointment as Research Associate, the individual is expected to find employment at another institution." I also am assured that Dr. Kahana was not the arbiter of your extension. The decision was reached by a departmental review which involved extensive discussions between Dr. Samios and Dr. Blume, and other senior staff physicists. As a result, I find that the Department acted properly and regret to tell you that I find no reason to reverse their decision.

As to the issue that you have been harassed by Dr. Kahana, you make a

serious charge, independent of the issue of your appointment to the scientific staff. I am directing that this charge be investigated.

Sincerely yours,

George H. Vineyard
Director

bcc: R. C. Anderson
N. P. Rathvon
J. S. Washburne
N. P. Samios
R. R. Rau

CLARK WULF & LEVINE
113 UNIVERSITY PLACE
NEW YORK, N. Y. 10003
(212) 475-3232

RAMSEY CLARK
ALAN H. LEVINE
MELVIN L. WULF

August 23, 1978

Dr. George H. Vineyard
Director
Brookhaven National Laboratory
Upton, New York 11973

Dear Dr. Vineyard:

This firm represents Dr. Michaela Golin in connection with her charge of sex discrimination against Brookhaven National Laboratory.

Dr. Golin, you will recall, wrote you on July 1, 1978 and charged Dr. S. Kahana with sexually harassing her and charged the Physics Department with denying her a staff appointment because she resisted, and then complained of, his advances. In your August letter, you upheld the action of the Physics Department and promised an

investigation of Dr. Kahana's actions.

Subsequently, Dr. Rathvon invited Dr. Golin to appear before a staff committee which was investigating the charge of sexual harassment. When Dr. Rathvon confirmed to me that the committee was foreclosed from investigating the denial of her appointment, I told him that, on my advice, Dr. Golin would not appear.

Although I have no reason to believe that the committee's investigation would not be fair, the limited scope of its inquiry would preclude it from considering the equally serious allegation that the Physics Department, and by inference, the Laboratory had permitted sex discrimination to infect the staff appointment process.

I am sure that Physics Department members vigorously disputed that allegation in their discussions with you. Nonetheless, the record of the department

in the appointment of women to staff positions gives strong indication of sex bias. Both the Laboratory's Affirmative Action Plan and the recent Compliance Review by the Department of Energy document the failure of the Physics Department to hire and promote professional women. While it may be true that the Department faces "stiff competition" for the few available women (Affirmative Action Program, p. 53d), the treatment of Dr. Golin suggests that competition may not be the only explanation for the Department's underutilization of professional women.

In your August 1 letter, you advise Dr. Golin that since 1968, only two post-doctoral research associates have been appointed to staff positions in theoretical physics. However, there have apparently been a substantial number of such appointments in experimental

physics, thus suggesting that the Staff Manual Policy cited by you is no bar to considering Dr. Golin for a staff position.

I need not tell you that Dr. Golin's allegations, if proven, constitute a serious violation of Title VII of the Civil Rights Act of 1964. I and Dr. Golin would hope that this matter can be resolved without legal action. Towards that end, I would be happy to discuss the matter with you. I will be out of town next week. You may reach me here after Labor Day.

Sincerely yours,

Alan H. Levine

AHL:gg

BROOKHAVEN NATIONAL LABORATORY
ASSOCIATED UNIVERSITIES, INC.
Upton, New York 11973

Personnel (516) 345-2113

August 11, 1978

Ms. M. B. Golin
c/o Department of Physics
Brookhaven National Laboratory
Upton, New York 11973

Dear Ms. Golin:

The following is in answer to your request.

As of July 2, 1978, there are 160 employees with tenure on the Scientific Staff; two of them are women.

In addition Dr. T. Goldhaber has an emeritus appointment.

Very truly yours,

Joseph S. Washburne, Manager
Personnel and Labor Relations

Enclosure (4)

EQUAL EMPLOYMENT OPPORTUNITY POLICY STATEMENT

Brookhaven National Laboratory is committed to a policy of Equal Opportunity in Employment and a program of Affirmative Action for achieving equality of opportunity. Our goal is equality of opportunity for all, in recruitement, hiring, training, and promotion, without regard to race, color, religion, national origin, sex, or non-limiting handicaps. The Laboratory's Affirmative Action Program for Fiscal Year 1977 defines specific responsibilities for the implementation of affirmative action objectives. The Laboratory will pursue this Affirmative Action Program with a significant, sustained, and broadly participatory effort keyed to the problems and needs of

minority groups and women, and directed toward finding, employing, and advancing women and minorities who can contribute to the Laboratory's work.

It is my long range objective to increase the number of women and minorities in areas of underutilization, through new hires, training, and encouragement, to reflect or exceed their composition in the work force.

I expect a commitment from all department and division heads, and I urge each employee to add his or her efforts toward making this program a success.

Mr. Harvey Thomas is my assistant for Affirmative Action and has the responsibility of recommending specific steps to achieve equality of opportunity. He also has the responsibility for

monitoring and reporting to me the progress of each part of the Laboratory. We have made advances we can be proud of, but much remains to be done.

/s/
George H. Vineyard
Director

August 16, 1976

Comparison of professional achievements of Dr. Michaela B. Golin and Dr. D.J. Millener.

PROFESSIONAL INFORMATION	M.B. GOLIN	D.J. MILLENER
Professional Experience	Shell Model (N. Structure) Cluster Model (N. Structure) Woods-Saxon Model (N. Reactions) Double Folding (N. Reactions) Resonances (N. Reactions)	Oxford SU(3) Shell Model Techniques
Nature of Appointment at Brookhaven National Laboratory	Temporary: (Postdoctoral Research Associate)	Temporary: (Assistant Physicist)
Number of prior postdoctoral appointments	1	1

Total Number of publications as of 1979 (*)	13	10
Total Number of BNL publications as of 1979 (*)	6	3
Number of Invited Talks at Conferences/Workshops from 1976 to 1979	2	1
Total Number of Citations (**) to work performed at BNL from 1976 to 1979	26	20

(*) - Excludes contributed papers and abstracts published in conference proceedings, and includes work submitted for publication.

(**) - The number of citations measures the interest generated in the field by the candidate's research. The quoted number of citations is cumulative through 1982. The data was obtained from the "Science Citation Index", published by the Institute for Scientific Information, Inc., 3501 Market Street, Philadelphia, Pennsylvania.

No. 85-826

Supreme Court, U.S.
FILED
DEC 16 1985
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

MICHAELA BERESTEANU GOLIN,

Petitioner,

v.

BROOKHAVEN NATIONAL LABORATORY,

Respondent.

On Petition for Writ of Certiorari
To the United States Court of
Appeals for the Second Circuit

RESPONDENT'S BRIEF IN OPPOSITION

ANDREA S. CHRISTENSEN
(Counsel of Record)

MICHAEL STARR

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(212) 407-8000

Attorneys for Respondent

BEST AVAILABLE COPY

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

No. 85-826

MICHAELA BERESTEANU GOLIN,

Petitioner,

v.

BROOKHAVEN NATIONAL LABORATORY,

Respondent.

On Petition for Writ of Certiorari
To the United States Court of
Appeals for the Second Circuit

RESPONDENT'S BRIEF IN OPPOSITION

OPINIONS BELOW

Respondent Brookhaven National Laboratory ("Brookhaven")[1] submits this brief in

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[1] Brookhaven National Laboratory is operated by Associated Universities, Inc. ("AUI"), a not-for-profit corporation organized under the education laws of the State of New York. Institutions of higher education represent-

(Footnote continued)

opposition to the petition for writ of certiorari of Petitioner Michaela Beresteanu Golin ("Golin") to review the judgment of the United States Court of Appeals for the Second Circuit, entered April 19, 1985. That judgment (A 1a-2a) affirmed the dismissal after trial of Golin's complaint "substantially for the reasons" set forth in the district court's unreported Memorandum and Order, dated January 26, 1984 (A 3a-39a).

STATEMENT OF THE CASE

This case involves Golin's sex discrimination and sexual harassment claims, which were concocted only after she was informed that her appointment at Brookhaven

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(Footnote 1 continued from previous page)
ed on AUI's Board of Trustees are as follows: Columbia University, Cornell University, Harvard University, John Hopkins University, Massachusetts Institute of Technology, Princeton University, University of Pennsylvania, University of Rochester, Yale University.

would not be extended. After a four-day bench trial, the district court entered judgment against Golin dismissing on the merits her complaint of sex discrimination, sexual harassment and retaliation in connection with her two-year employment as a Brookhaven Research Associate. That judgment was supported by extensive and detailed Findings of Fact (A 4a-26a) and Conclusions of Law (A 27a-38a), and it was affirmed in all respects by the Second Circuit after a full briefing by both parties.

Notwithstanding the ample consideration given her meritless claims, Golin petitions for yet another review by this Court. Her petition merely continues her relentless pursuit of imagined wrongs. It raises no question warranting Supreme Court review, but merely reiterates factual and legal contentions rejected by two courts below.

Each of Golin's allegations under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq., includ-

ing those of purported sexual harassment, were properly adjudicated in accordance with established law as to which all courts of appeals are in agreement. Moreover, the sexual harassment issue before this Court in PSFS Savings Bank v. Vinson, 106 S. Ct. 57 (Oct. 7, 1985) (No. 84-1979), granting cert. to Vinson v. Taylor, 753 F.2d 141 (D.C. Cir. 1985), has no application to Golin's case, which, as is explained below (see pp. 18-25 infra), was properly decided on the basis of legal principles about which there is no conflict among the courts of appeals. Therefore, even if this Court were to approve Vinson's atypical formulation of an employer's vicarious liability for sexual harassment by supervisory personnel, that would have no bearing on this case.

Accordingly, Golin's petition for writ of certiorari should be denied.

STATEMENT OF FACTS

Golin's purported statement of facts improperly attempts to embroil this Court in factual contentions already decided in Brookhaven's favor by the district court. The true facts, as found by the district court, are fully set forth in its Memorandum and Order. (A 3a-38a.) As is most pertinent to the instant petition, the facts may be summarized as follows.

Golin's Position at Brookhaven

Brookhaven employed Golin as a post-doctoral Research Associate, a junior, entry-level training position. (A 5a.) Customarily, the position is held for one year and renewed for a second, but was never extended beyond that for Research Associates, like Golin, working in a theoretical discipline. (A 5a, A 9a-10a.)

After termination of their appointments (A 10a), Brookhaven's Research Associates normally obtain positions at other institutions. Promotion from the position of Research Associate to a permanent posi-

tion on Brookhaven's scientific staff is extremely rare; in the Nuclear Theory Group, to which Golin belonged, only one such promotion has ever occurred since before 1970. (Id.)

Allegations of Sexual Harassment

During Golin's time at Brookhaven, the Group Leader of the Nuclear Theory Group of the Physics Department was Dr. Sidney H. Kahana, who was one of three senior scientists in the Nuclear Theory Group. (A 10a-11a.) Although Kahana was nominally Golin's supervisor, he had no special authority over Dr. Golin's work or employment status; nor did he assign work to Golin or control with whom she collaborated. (Id.)

In December 1976, Golin was offered the opportunity to collaborate with either Kahana or one of the other senior scientists on their respective research projects. (A 12a.) She chose to work with Kahana and, thereafter, met frequently with him from January through approximately April 1977, when she withdrew from active

collaboration with Kahana. (A 12a-13a.) Golin alleges that during this period of time, she was subject to sexual harassment by Kahana. (Id.)

The incidents alleged by Golin to have occurred were of three types: nudges by Kahana's knee or elbow; remarks which Golin interpreted to be of a sexual or provocative nature; and an incident of touching or pointing to Golin's waistline in connection with Golin's comment that the cafeteria food was causing her to gain weight. (Id.) Significantly, it was admitted at trial and found by the district court that Golin "was not sure whether Kahana's prior conduct had any sexual connotations" until six months after the fact, when she learned her appointment was not being renewed. (A 21a-22a (emphasis added).) The District Court found it unnecessary to determine whether these alleged incidents of harassment actually took place, because it concluded, on other grounds, that Golin had failed to prove her case. (A 12a-13a; A 27a-38a.)

Brookhaven's Decisions as to Golin's Continued Employment

Following the one-year extension, Golin's appointment as a Research Associate was scheduled to expire on October 4, 1978. (A 14a.) In the fall of 1977, Kahana reminded Golin that her temporary Research Associate position would end the following October and that she should begin making inquiries for future employment.

Subsequently, Golin learned that Dr. D.J. Millener, who had been hired by Brookhaven as an Assistant Physicist, was being promoted to Associate Physicist. (A 15a.) Millener originally had been hired as a member of the scientific staff, which unlike Golin's position, was a "tenure track" appointment. (A 15a-16a.) His promotion was in accordance with normal progression, based entirely on his own ability, and unrelated to Golin's employment at Brookhaven. (Id.) Millener's advancement did not create a vacancy to which Golin could have been promoted. (A 16a.)

Golin's Failure to Complain of the Alleged Harassment

In December 1977, Golin met, at her request, with the then-Chairman of the Physics Department, Dr. Nicholas P. Samios, and the Assistant Chairman of the Physics Department, Dr. Martin Blume, who had primary responsibility for personnel matters. (A 17a; A 13a-14a.) At that meeting, Golin stated her disagreement with the decision not to extend her Research Associate appointment for a third year and her belief that Kahana's evaluation of her work was unfair. (A 17a.) Golin did not state, however, that there were any problems in her personal relationship with Kahana and made no mention of harassment, sexual or otherwise. (Id.) In fact, Golin did not complain about sexual harassment or any personal problems with Kahana to anyone with supervisory responsibility at Brookhaven at any point during 1977. (A 13a-14a.) Nor did she ever complain to Brookhaven's affirmative action personnel, though the

availability of such avenues of redress were well publicized. (Id.)

During the December meeting, Samios and Blume undertook to review the decision not to extend Golin's appointment. (A 17a.) Subsequently, they discussed Golin's work individually with each of the three senior scientists of the Nuclear Theory Group, who all agreed that Golin should be neither continued nor promoted. (A 18a.) Moreover, Samios and Blume conducted their own review of Golin's publications and came to the same conclusion. (Id.)

In February 1978, Samios and Blume met with Golin. They advised her of the results of their review and offered assistance in her finding a position elsewhere. (A 19a.) At that meeting, Golin alleged for the first time that she was being harassed by Kahana. (A 19a-20a.) The "harassment" she referred to, however, had nothing to do with what she later characterized as sexual harassment in January

through April 1977, but rather referred only to Kahana's Fall 1977 reminders that Golin should be seeking employment at other institutions. (A 19a-20a; A 14a-15a.) Because of Golin's complaints about Kahana, it was decided that she should work under the direction of another senior scientist of the Nuclear Theory Group, and additional efforts were made to assist Golin in finding future employment. (A 20a.)

In late June 1978, Golin met again, at her request, with Samios and Blume. (A 20a-21a.) She stated that she had learned that an affirmative action representative from the Department of Energy would be coming to Brookhaven and that she wanted to speak to him about the sexual discrimination and sexual harassment she had allegedly experienced. <u>This was the first time Golin had ever mentioned to Blume or Samios that she had been subject to sexual harassment by Kahana</u>. (A 21a.) Even then, however, her allegations were vague: Samios and Blume asked Golin to

identify the nature of the alleged sexual harassment, but Golin refused to give specifics. (A 22a.)

Golin's Failure to Cooperate With Brookhaven's Investigation

Immediately following receipt of Golin's June 1978 allegations of sexual harassment, Brookhaven began its investigation. In particular, Samios and Blume confronted Kahana with Golin's charges. (A 22a-23a.) Kahana denied emphatically that he had ever sexually harassed Golin and asked for details of her allegations; Blume and Samios, of course, had no details to supply. (Id.)

Following her June meeting with Samios and Blume, Golin wrote a letter to Brookhaven's Director, Dr. George H. Vineyard, in which she reasserted sexual harassment and sexual discrimination allegations. (A 23a.) Vineyard promptly responded by appointing a Committee to investigate. (A 24a.) A Committee hearing was scheduled for August 1978 but was cancelled after

Vineyard received a letter from Golin's attorney stating that she would not attend. (A 24a-25a.) Brookhaven then discontinued its investigation of Golin's sexual harassment allegations because of her own refusal to cooperate with the Committee's investigation. (Id.)

In September 1978, Samios met with Golin and discovered that she still was not making any real effort to find other employment opportunities. (A 25a.) Consistent with Brookhaven's regular practice, Samios gave Golin a final, three-month extension of her employment to assist her in finding another job. (Id.) Thereafter, for nine months following her termination, Golin continued to work on her own projects with research scientists on Brookhaven's staff and to use its facilities, though she neither sought nor obtained the appropriate authorizations. (A 26a.)

REASONS FOR DENYING THE WRIT

1. The District Court Properly Applied the Title VII Burden of Proof.

Golin contends that the district court misinterpreted this Court's teaching in United States Postal Service Board of Governors v. Aikens, 460 U.S. 711 (1983), concerning the role of prima facie case and the burden of proof in Title VII cases. (Pet. at 22-26.)[2] That issue was not raised below.[3] Moreover, even a cursory reading of the district court's decision shows that it fully engaged in the level of factual specificity required by Aikens and its precursors. Indeed, the district court expressly noted its awareness of -- and its intention to apply -- Aikens' teachings to Golin's case. (A 39a.) In any event, the

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2 As used herein "Pet." refers to Golin's Petition for Writ of Certiorari, dated November 8, 1985.

3 Golin's 49-page brief to the court of appeals does not even cite Aikens, on which she here relies.

district court's purported misinterpretation of Aikens is hardly a question substantial enough to command Supreme Court review.

2. The Court of Appeals' Affirmance Is Fully Consonant With Decisions of All Other Courts of Appeals as to Elements of a Title VII Claim for Sexual Harassment by Supervisory Employees.

a. No new question of law is raised by the decision below.

The existence of a Title VII claim for sexual harassment by supervisory personnel is now well settled in the courts of appeals. The district court's decision here merely applied that established law to the facts of this case. Moreover, this Court will address the question of sexual harassment under Title VII in PSFS Savings Bank v. Vinson, and Golin's case raises no legal or factual issue not already present there. Indeed, Golin's case would be a particularly inapposite vehicle for Supreme Court consideration of this issue because, by the facts found at trial, Golin has no claim for sexual harassment under the standards

established by any of the courts of appeals.

b. The decision below is completely consistent with all courts of appeals as to the elements of a claim of sexual harassment under Title VII.

All courts of appeals are agreed that claims for sex-based discrimination under Title VII by virtue of sexual harassment fall into two distinct categories: (1) that the employee suffered an adverse employment decision or loss of a tangible job benefit as a consequence of her response to sexual harassment or (2) that the sexual harassment was of such nature and magnitude as to create a hostile, intimidating or offensive work environment. See Henson v. City of Dundee, 682 F.2d 897, 901-02, 908-09 (11th Cir. 1982); accord Vinson v. Taylor, 753 F.2d at 144-45; Phillips v. Smalley Maintenance Services, 711 F.2d 1524, 1528-29, (11th Cir. 1983); Katz v. Dole, 709 F.2d 251, 254-55 (4th Cir. 1983); Bundy v. Jackson, 641 F.2d 934, 943-48 (D.C. Cir. 1981); Ferguson v. E.I. DuPont de Nemours &

Co., 560 F. Supp. 1172, 1196-99 (D. Del. 1983).

The district court's decision, as affirmed by the court of appeals, was fully consonant with this established law and recognized that sexual harassment of either kind is, in a proper case, actionable under Title VII. (A 29a-30a.) Nor did the district court deny that employers could be vicariously liable for sexual harassment commited by their supervisory employees provided the other elements of a sexual harassment claim are met. The decision below merely applied this law to the facts it found, concluding that Golin failed to prove her case.[4]

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[4] Golin persists here in disputing the district court's findings, even though the court of appeals has already rejected her contentions that such findings were "clearly erroneous."

c. The district court's conclusion that Golin failed to prove liability for purported sexual harassment under a hostile-work-environment theory is not inconsistent with the law of any circuit.

Only three courts of appeals have directly addressed the elements of a claim for sexual harassment by a supervisor under a hostile-work-environment approach. Two of those courts have held that employees alleging sexual harassment of this sort must prove, as an essential element of their claim, that the employer knew or should have known of the harassment in question and failed to take prompt remedial action. Katz v. Dole, 709 F.2d at 255; Henson v. City of Dundee, 682 F.2d at 905.

Following this authority, the district court dismissed Golin's claim of sexual harassment predicated on the maintenance of a hostile work environment because she failed to prove that Brookhaven officials "in any way condoned or acquiesced in [Kahana's] alleged sexual harassment." (A 33a-34a.) In particular, the court found that Brook-

haven had neither actual nor constructive notice of the alleged harassment until a year after it had ceased; that Brookhaven officials reacted promptly to Golin's complaints and that their efforts to investigate the charges and, if necessary, to remedy them were thwarted by Golin's own refusal to cooperate in the investigation. (A 34a-35a.)

Golin argues that the District of Columbia Court of Appeals' decision in Vinson is to the contrary (Pet. at 36-39) and thereby insinuates a conflict among the circuits warranting Supreme Court review.[5] Such reasoning fails because Golin's case

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[5] Golin is wrong in stating (Pet. at 34-35) that the decision below conflicts with Horn v. Duke Homes, 755 F.2d 599 (7th Cir. 1985); Craig v. Y & Y Snacks, Inc., 721 F.2d 77 (3d Cir. 1983); and Miller v. Bank of America, 600 F.2d 211 (9th Cir. 1979). Each of those cases involved sexual harassment of the tangible-job-detriment variety, for which different standards apply. Even the Vinson court recognized that theories of vicarious liability could not be automatically transferred from that context to cases involving only the hostile-work-environment kind of sexual harassment.

is distinguishable from Vinson on its facts.

First, the Vinson court's decision was predicated on the existence of "pervasive on-the-job sexual harassment . . . that illegally poisoned the 'psychological and emotional work environment.'" 753 F.2d at 145 (footnote omitted); cf. EEOC Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11(a)(3)(1985) (sexual harassment requires "purpose or effect of unreasonably interfering with an individual's work performance"). In particular, the sexual harassment alleged in Vinson involved the explicit requests for sexual favors, forced submission to sexual advances, assault, rape, intrusions on privacy, and exhibitionism. 753 F.2d at 143-44. Nothing like that occurred here.

The only alleged touchings involved "[n]udges" by Kahana's knee or elbow or, in one alleged incident, the touching or pointing to Golin's waistline in response to her comment about the cafeteria food.

(A 12a-13a.) Further, the comments which Golin construed to be "sexual" or "provocative" were worlds apart from the "'sexually stereotyped insults' or 'demeaning propositions'" referred to in Vinson. 753 F.2d at 145.[6] Golin herself did regard this conduct as having "any sexual connotations" until at least six months after the fact. (A 22a.)

Thus even if something that could be labeled "sexual harassment" occurred in Golin's case, it was hardly the kind of conduct that "'so heavily polluted'" the work environment "'as to destroy completely the emotional and psychological stability'" of female workers. Bundy v. Jackson, 641 F.2d

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6 For example, Golin testified that at one time Kahana pointed to the letters "FK" on a computer print-out and laughed. Tr. (Nov. 30, 1983) at 56. The only other specific incident of "sexual" or "provocative" language to which Golin testified involved Kahana's alleged statement that another female research associate was "more willing." Id. Kahana, of course, denied both incidents. Tr. (Dec. 1, 1983) at 107, 123-25.

934, 944 (D.C. Cir. 1981) (quoting Judge Goldberg's opinion in Rogers v. EEOC, 454 F.2d 234 (5th Cir. 1971), cert. denied, 406 U.S. 957 (1972) (ethnic harassment)). In this case, the district court expressly acknowledged that "a showing of pervasive harassment can in an appropriate case give rise to" vicarious Title VII liability, but concluded that "no such showing of pervasive harassment was made here." (A 34a-35a.)[7]

Second, Vinson was predicated on the conduct of a bank branch manager who was vested with such authority over employees as to be "an 'agent' of the employer" for

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[7] Unlike Vinson, wherein the district court precluded evidence as to alleged sexual advances toward other female employees in the plaintiff's case in chief, 753 F.2d at 144, the district court here gave Golin ample opportunity to substantiate her allegation that Kahana had "molested" other women at Brookhaven. The court nonetheless expressly found that "no other [Brookhaven] employee experienced sexual harassment or voiced any complaint." (A 35a.)

purposes of Title VII. 753 F.2d at 148-50. Even accepting Vinson's extension of this agency theory to individuals less "richly endowed" with employment-related power, id. at 150, the alleged harasser here is not the kind of "supervising superior" referred to by the Vinson court.

Thus, for example, the decision of whether or not even to work with Kahana, as opposed to some other senior scientist, was made by Golin herself, as was the decision to withdraw from such collaboration four months later. (A 12a, 13a.) Indeed, as the district court expressly found, Kahana had "no special authority over Dr. Golin's work or employment status," and "did not assign work to Dr. Golin or control with whom she collaborated." (A 11a.) In addition, the particular employment decisions of which Golin complained -- the failure to renew her Research Associate position for a third full year or to promote her to the scientific staff -- were both matters Kahana did not control. (A 23a.) In sum,

Kahana's ability to influence Golin's employment was less than that of a college department chairman vis-a-vis a non-tenured professor, and such a relationship by itself is not a sufficient predicate of employer liability for sexual harassment. Fisher v. Flynn, 598 F.2d 663, 665-66 (1st Cir. 1979).

Third, under Barnes v. Costle, 561 F.2d 983 (D.C. Cir. 1977) -- a decision that, like Vinson, was authored by Circuit Judge Robinson -- employers "may be relieved from responsibility under Title VII" for sexual harassment by supervisory employees where, as here, the conduct violated employer policy without the employer's knowledge and "the consequences are rectified when discovered." Id. at 993 (footnote omitted). Here, however, unlike Vinson and Barnes, the purported victim deliberately thwarted Brookhaven's prompt efforts to investigate and, if necessary,

remedy the charge. (A 35a).[8] Golin's refusal to cooperate was not based on fear of reprisal -- Golin had long since been removed from any involvement with Kahana (A 20a) -- but solely because the committee did not have authority to consider Golin's additional claim for a promotion to which she was neither eligible nor qualified (A 25a).

In sum, even if this Court were to sustain Vinson's articulation of the elements of a claim of sexual harassment under the hostile-work-environment theory, that would have no bearing on Golin's case since she failed to prove such a claim even under Vinson's formulation of the law.

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[8] Although it has been said that the failure to pursue internal remedies does not preclude a Title VII action for sexual harassment, Miller v. Bank of America, 600 F.2d 211, 213 (9th Cir. 1979), the plaintiff here actually impeded Brookhaven's investigation by refusing to give any specifics of her allegation to any Brookhaven official or to an impartial committee established for that purpose.

d. The district court's conclusion that Golin failed to prove liability for purported sexual harassment under a tangible-job-detriment theory is not inconsistent with the law of any circuit.

There is no conflict among the circuits as to the elements of a claim of sexual harassment under the tangible-job-detriment theory, and certainly no dispute as to the need for the plaintiff to show a causal nexus between her response to the harassment and her job opportunities. See Henson v. City of Dundee, 682 F.2d at 909 (11th Cir. 1982); accord Vinson, 753 F.2d at 144-45 & n.30 (D.C. Cir. 1985); Craig v. Y & Y Snacks, Inc., 721 F.2d 77, 80 (3d Cir. 1983); Katz v. Dole, 709 F.2d at 254 (4th Cir. 1983); Fisher v. Flynn, 598 F.2d at 666 (1st Cir. 1979); Barnes v. Costle, 561 F.2d at 992 (D.C. Cir. 1977); Ferguson v. E.I. DuPont de Nemours, 560 F. Supp. at 1196. Here, Golin made no showing whatsoever that the purported harassment had any effect on her Brookhaven employment. Indeed, the district court expressly so

found: "There was no causal connection between any personal difficulties Dr. Golin may have had with Dr. Kahana and her opportunities for advancement at Brookhaven." (A 16a-17a (emphasis added).)

First, Kahana had no authority over the two specific employment opportunities Golin said she was improperly denied. (Id.) Second, the employment opportunities Golin sought simply were not available to her as a Research Associate completing the second year of her appointment. (A 36a.)[9] In fact, at the time in question, there was no vacancy in the Nuclear Theory scientific staff to which Golin could have been promoted. (A 16a.) Third, the employment de-

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9 As the district court found, (1) no Research Associate in the theoretical group had ever received a third year extension to his or her appointment (A 9a-10a; A 33a) and (2) promotions from the training position of Research Associate to the regular staff are exceedingly rare, being given only to exceptionally qualified individuals, which Golin was not. (A 33a; cf. A 18a.)

cisions in question were independently reviewed and ratified before Golin's allegations on sexual harassment were made. (A 33a; see also A 17a-19a.)

The cases Golin cites (Pet. 48-50) are not in any way inconsistent with the legal conclusions of the district court because, in each of those cases, a causal nexus to an adverse employment decision was shown.[10]

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10 See Horn v. Duke Homes, 755 F.2d 599, 601 (7th Cir. 1985) (employee terminated "because of her refusal to respond to" plant superintendent's sexual advances) (emphasis added); (superintendent "demanded sex as a condition of employment") id. at 604 (emphasis added); Henson v. City of Dundee, 682 F.2d 897, 901 (police dispatcher prevented from attending police academy "because of her refusal to have sexual relations with [chief of police]") (emphasis added); (issue is whether police chief "insisted upon sexual favors as a condition to [plaintiff's] attendance at the academy") id. at 911 (emphasis added); Miller v. Bank of America, 600 F.2d 211, 212 (9th Cir. 1979) (employee "fired because she refused her supervisor's demand for sexual favors") (emphasis added).

3. Golin's Claim of Retaliation Was Fully Considered by the Courts Below.

There is no basis to Golin's contention (Pet. at 61) that her retaliation claim was "overlooked." The gist of Golin's retaliation claim is that adverse employment decisions were made after she complained of Kahana's alleged sexual harassment. But, Golin did not complain of sexual harassment until long after the final determinations as to her renewal or promotion had been made. (A 21a.)[11] Even after that complaint, Brookhaven rendered considerable assistance to Golin. (A 25a-26a.) Moreover, the district court expressly concluded that Brookhaven "articulated legitimate, nondiscriminatory reasons for its de-

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11 Golin improperly persists in her contention that she complained of sexual harassment in December 1977 (Pet. at 63), even though the district court found no such complaint until June 1978. (A 20a-21a; cf. A 17a (finding Golin did not complain of "harassment, sexual or otherwise" in December 1977).)

cision" and that Golin failed to show "by a preponderance of the evidence that such reasons were a pretext for discrimination." (A 36a-37a.) This ultimate conclusion completely resolves not only Golin's sex discrimination and sexual harassment claims but her retaliation claim as well. Finally, it is preposterous to suggest that the court of appeals "overlooked" Golin's retaliation argument, since that was one of four points she expressly argued in her brief to that court.

In sum, the courts below did not disregard Golin's retaliation claim; rather, they found it too frivolous to discuss.

CONCLUSION

For all of the foregoing reasons, the petition for writ of certiorari should be denied.

Dated: New York, New York
December 13, 1985

Respectfully submitted,

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No. 85-826

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

MICHAELA BERESTEANU GOLIN,

Petitioner,

v.

BROOKHAVEN NATIONAL LABORATORY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

Brookhaven National Laboratory, ("Brookhaven" or "the Laboratory"), in its opposing brief No. 85-826, fails almost completely to meet the contentions

made in the petition for writ of certiorari. ("Pet.").

Additionally, Brookhaven's brief at a number of places misstates the record.

Petitioner shall attempt to correct here, as succinctly as possible, the errors in Brookhaven's opposing brief ("Brief in Opp.") which seem to be in most urgent need of correction.

In addition, pursuant to Rules 22.1 and 34.6 of this Court, petitioner prays the Court to disregard all the scandalous matter contained in the respondent's brief.

BROOKHAVEN'S BASIC MISCONCEPTIONS

1. BROOKHAVEN'S MISCONCEPTION OF THE "PRIMA FACIE CASE"

With respect to the conflict between the District Court's decision in the instant case and this Court's holdings in United States Postal Service Board of Governors v. Aikens, 460 U.S. 711 (1983), Brookhaven asserts that the "issue was not raised below." (Brief in Opp., at 14 & n.3).

Contrary to Brookhaven's assertion, the pro se plaintiff fully considered this matter and extensively quoted the teachings of Aikens in the timely Reply Brief for the Appellant filed below. (Reply Brief for the Appellant, at 3-4).

In that brief, Golin argued that the Trial Court's dismissal of her complaint "for failure to establish a prima facie case of employment discrimination under

Title VII of the Civil Rights Act of 1964, as amended", (Conclusion of Law #14, Appendix to Petition, ["App."], 38a; id., at 32a-36a), occurred at the close of the evidence, after the denial of Brookhaven's motion to dismiss, at a stage when the required establishment of a rebuttable presumption already had "drop[ped] from the case", Aikens, 460 U.S., at 715, and was "no longer relevant." Id.

In its opposing brief, Brookhaven fails to meet Golin's argument on the conflict between Aikens and the decision below. (Pet. 22-26). Instead, Brookhaven urges that the District Court's "purported misinterpretation of Aikens is hardly a question substantial enough to command Supreme Court review." (Brief in Opp., at 15).

Contrary to Brookhaven's interpretation, a lower court's similarly mistaken

view of the established Title VII precedent was considered substantial enough, not only to command review by this Court, but to cast doubts upon the District Court's findings of fact in favor of the employer. Aikens, 460 U.S., at 717.

Petitioner respectfully submits that the same reasoning is even more appropriate here. Indeed, if a District Court's mistaken interpretation of the phrase "prima facie case" in the Title VII context represented error before Aikens, now, in light of this Court's express holdings in Aikens, such a mistake is far more serious, and amply warrants review.

2. BROOKHAVEN'S MISCONCEPTION OF THE SEXUAL HARASSMENT ISSUE

A. The Laboratory's misreading of Vinson

Brookhaven asserts that Golin "failed to prove [a hostile-work-environment] claim even under Vinson's formulation of the law." (Brief in Opp., at 25).

However, in its brief, Brookhaven ignores almost entirely the holdings of Vinson v. Taylor, 753 F.2d 141 (CADC 1985), and urges instead its own hostile-work-environment theory of sexual harassment. (Brief in Opp., at 18-25).

Brookhaven's theory is wholly without foundation.

First, Brookhaven urges that Vinson is predicated on the existence of pervasive on-the-job sexual harassment, and particularly, on offenses such as assault, rape, and exhibitionism. (Brief

in Opp., at 20).

Neither the courts nor the EEOC have limited Title VII protection to transgressions of such nature and magnitude.

Contrary to Brookhaven's narrow interpretation of Vinson, the views of the District of Columbia Circuit are apparent from the Court's reliance on Bundy v. Jackson, 641 F.2d 934 (CADC 1981).

Although no physical violence had been alleged in Bundy, the Court pointed out that "[s]exual stereotyping through discriminatory dress requirements may be benign in intent, and may offend women only in a general, atmospheric manner, yet it violates Title VII. Racial slurs, though intentional and directed at individuals, may still be just verbal insults, yet they too may create Title VII liability. How then can sexual harassment, which injects the most demeaning sexual stereotypes into the

general work environment and which always represents an intentional assault on an individual's innermost privacy, not be illegal?" Bundy v. Jackson, 641 F.2d 934, 945 (CADC 1981) (emphasis added).

Petitioner respectfully submits that the pinching, nudging, obscenity, comments on her "willingness", etc., to which she was subjected by her supervisor, (Pet. 9-11), represent precisely the "'sexually stereotyped insults' or 'demeaning propositions' that illegally poisoned the 'psychological and emotional work environment'." Vinson, 753 F.2d, at 145 (footnote omitted).

Brookhaven additionally claims that it will not be held responsible for the alleged sexual harassment of Golin by Kahana, even if the Vinson theory of vicarious employer liability were upheld by this Court. (Brief in Opp., at 22-25).

In support of this proposition,

Brookhaven relies on Fisher v. Flynn, 598 F.2d 663 (CA1 1979), which conflicts with Vinson in all respects, and on Barnes v. Costle, 561 F.2d 983 (CADC 1977).

Citing Barnes, Brookhaven asserts that Kahana's alleged sexual harassment of Golin violated Laboratory policy. (Brief in Opp., at 24).

However, Vinson, which Brookhaven fails to quote, expressly holds that "[t]he bare existence of a company policy of nondiscrimination does not affect the employer's chargeability. [Vinson's employer] had such a policy, but it affords small comfort when violations go unrectified." 753 F.2d, at 150, n.71 (citations omitted); id., at 149, quoting with approval the EEOC Guidelines on Discrimination Because of Sex, ("Guidelines"), 29 C.F.R. § 1604.11(c) (employer strictly liable for sexual harassment by supervisory personnel, regardless of

whether the acts complained of were forbidden by the employer); see also Miller v. Bank of America, 600 F.2d 211, 213 (CA9 1979) (employer vicariously liable for the sexual harassment of a subordinate by her supervisor, even though supervisor violated company policy).

Brookhaven further asserts that Golin forfeited her opportunity for redress because she "impeded Brookhaven's investigation by refusing to give any specifics of her allegation to any Brookhaven official ***." (Brief in Opp., at 25, n.8).

Brookhaven's assertion is not only unsupported by any record references, but is actually contradicted by the record below. (Pl. Ex. 10, offered and admitted in evidence at Tr., Nov. 30, p. 67, full text reproduced at App. 58a-61a).

Moreover, the Laboratory fails to

meet Golin's contention that Brookhaven took no remedial action whatsoever even after Golin supplied it with additional "specifics" during the discovery stage below. (Pet. 46).

Finally, despite Brookhaven's assertion that Golin's Group Leader was not the kind of "supervising superior" referred to by Vinson, (Brief in Opp., at 23), Brookhaven, in its opposing brief, does not deny that Kahana "had the responsibility to recommend all the employment decisions affecting his subordinates, e.g., their hiring, firing, evaluation, promotion, salary." (Pet. 7) (emphasis added).

According to the Vinson Court, this supervisory responsibility is sufficient to hold Brookhaven vicariously liable for Kahana's violations of Title VII. Vinson, 753 F.2d, at 150 & n. 69; see also Miller, 600 F.2d, at 213.

For the foregoing reasons, as well as those presented in the petition, and because of the close identity of issues in this case and in PSFS Savings Bank, FSB v. Vinson, cert. granted, No. 84-1979, 106 S.Ct. 57 (1985), the petitioner prays this Court to grant certiorari and review the decision below.

B. The Laboratory's misconception of the quid pro quo issue.

Contrary to Brookhaven's assertion, (Brief in Opp., at 26), the causal nexus to an adverse employment decision required by the two federal courts below and by the First Circuit, Fisher v. Flynn, 598 F.2d 663, 665 (CA1 1979), is not required by other courts of appeals. See, e.g., Horn v. Duke Homes, 755 F.2d 599, 603-604 (CA7 1985); Henson v. City of Dundee, 682 F.2d 897, 909, 911, n.22 (CA11 1982); Cf. EEOC Guidelines, 29 C.F.R. § 1604.11(a)(1).

Brookhaven, in its opposing brief, entirely ignores Golin's argument that the quid pro quo pressure to which she was undisputedly subjected by Kahana, in itself represents a blatantly disparate treatment that violates Title VII. (Pet. 50-51). See, e.g., Horn, 755 F.2d, at 603-604; Henson, 682 F.2d, at 909-911, n.22.

Moreover, as petitioner already has shown at considerable length, (Pet. 51-59), a causal nexus to an adverse employment decision is abundantly demonstrated by the undisputed evidence below.

Indeed, in its opposing brief, Brookhaven does not deny the documented failure of its management to provide equality of opportunity for women scientists, (Pet. 6-7), nor the admitted long-time friendship between Kahana and the alleged "reviewers" of Golin's work.

(Pet. 13). This undisputed evidence makes plain that the reasons articulated by Brookhaven for the challenged employment decisions are simply pretexts.

For the foregoing reasons, as well as those contained in the petition for writ of certiorari, petitioner prays that this Court grant the petition and review the decision below.

3. BROOKHAVEN'S MISCONCEPTION OF THE RETALIATION ISSUE

In its opposing brief, Brookhaven entirely ignores Golin's contention that the District Court made no findings whatsoever on the Laboratory's allegedly retaliatory denial of Golin's request for a transfer. (Pet. 60).

Brookhaven urges that the two federal courts below did not overlook Golin's retaliation claim, but rather "found it too frivolous to discuss." (Brief in Opp., at 30). No record

references are cited in support of this assertion, and petitioner believes that none are available.

In view of the Court of Appeals' summary affirmance, and the District Court's express failure to discuss Golin's retaliation claim, (App. 1a-3a), Brookhaven cannot impute its own reasoning to the two federal courts below. See, e.g., Taylor v. McKeithen, 407 U.S. 191, 194, n.4 (1972).

For the foregoing reasons, in addition to those contained in the petition for writ of certiorari, petitioner prays that a writ of certiorari issue to review the decision below.

CONCLUSION

Brookhaven does not deny the importance of the issues presented for review. Nor does it deny the existence of a conflict with prior decisions of this Court. The Laboratory's claim of a lack of conflict between the decision below and the decisions of other courts of appeals rests upon a number of gross misconceptions.

For the foregoing reasons, as well as those contained in the petition for writ of certiorari, petitioner prays that this Court grant the petition and review the judgment below.

Respectfully submitted,
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